United Nations

A/CN.4/L.917/Add.1

General Assembly

Distr.: Limited
21 June 2018

Original: English

International Law Commission
Seventieth Session
New York, 30 April–1 June and Geneva, 2 July–10 August 2018

Draft report of the International Law Commission on the work of its seventieth session

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Chapter IV
Subsequent agreements and subsequent practice in relation to the interpretation of treaties

Addendum

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E. Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties

2. Text of the draft conclusions and commentaries thereto

1. The text of the draft conclusions, together with commentaries thereto, adopted by the Commission on second reading, is reproduced below.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties

Part One
Introduction

Conclusion 1
Scope

The present draft conclusions concern the role of subsequent agreements and subsequent practice in the interpretation of treaties.

Commentary

(1) The present draft conclusions aim at explaining the role that subsequent agreements and subsequent practice play in the interpretation of treaties. They are based on the Vienna Convention on the Law of Treaties of 1969 (hereinafter "1969 Vienna Convention").[1] The draft conclusions situate subsequent agreements and subsequent practice within the framework of the rules of the Vienna Convention on interpretation by identifying and elucidating relevant authorities and examples, and by addressing certain questions that may arise when applying those rules.

(2) As is always the case with the Commission's output, the draft conclusions are to be read together with the commentaries.

(3) The draft conclusions do not address all conceivable circumstances in which subsequent agreements and subsequent practice may play a role in the interpretation of treaties. For example, one aspect not dealt with specifically is the relevance of subsequent agreements and subsequent practice in relation to treaties between States and international organizations or between international organizations.[2] The practice of international organizations is only addressed to a limited extent in draft conclusion 12, paragraph 3. The draft conclusions also do not address the interpretation of rules adopted by an international organization, the identification of customary international law or general principles of law. They are without prejudice to the other means of interpretation under article 31, including paragraph 3 (c), according to which the interpretation of a treaty shall take into account any relevant rules of international law applicable in the relations between the parties.

(4) The draft conclusions aim to facilitate the work of those who are called on to interpret treaties. Apart from international courts and tribunals, they offer guidance for States, including their courts, and international organizations, as well as for non-State actors and all others who are called upon to interpret treaties.

Part Two
Basic rules and definitions

Conclusion 2
General rule and means of treaty interpretation

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[1] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

[2] See Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations ("1986 Vienna Convention") (Vienna, 21 March 1986, not yet in force) (A/CONF.129/15); this does not exclude that some materials relating to such treaties, but which are also of general relevance are used in the commentaries.

1. Articles 31 and 32 of the Vienna Convention on the Law of Treaties set forth, respectively, the general rule of interpretation and the recourse to supplementary means of interpretation. These rules also apply as customary international law.

2. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose, as provided in article 31, paragraph 1.

3. Article 31, paragraph 3, provides, *inter alia*, that there shall be taken into account, together with the context, (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; and (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

4. Recourse may be had to other subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32.

5. The interpretation of a treaty consists of a single combined operation, which places appropriate emphasis on the various means of interpretation indicated, respectively, in articles 31 and 32.

Commentary

(1) Draft conclusion 2 situates subsequent agreements and subsequent practice as a means of treaty interpretation within the framework of the rules on the interpretation of treaties set forth in articles 31 and 32 of the 1969 Vienna Convention. The title "General rule and means of treaty interpretation" signals two points. First, article 31, as a whole, is the "general rule" of treaty interpretation.[3] Second, articles 31 and 32 together list a number of "means of interpretation", which shall (article 31) or may (article 32) be taken into account in the interpretation of treaties.[4]

Paragraph 1, first sentence — relationship between articles 31 and 32

(2) Paragraph 1 of draft conclusion 2 emphasizes the interrelationship between articles 31 and 32, as well as the fact that these provisions, together, reflect customary international law. The reference to both articles 31 and 32 clarifies from the start the general context in which subsequent agreements and subsequent practice are addressed in the draft conclusions.

(3) Whereas article 31 sets forth the general rule and article 32 the recourse to supplementary means of interpretation, these rules[5] must be read together as they constitute an integrated framework for the interpretation of treaties. Article 32 includes thresholds between the primary means of interpretation according to article 31,[6] all of which are to be taken into account in the process of interpretation, and "supplementary means of interpretation" to which recourse may be had, either in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 leaves the meaning of the treaty or its terms ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable.

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[3] Title of article 31 of the 1969 Vienna Convention.

[4] See the first report on subsequent agreements and subsequent practice in relation to treaty interpretation (A/CN.4/660), para. 8; M.E. Villiger, "The 1969 Vienna Convention on the law of treaties: 40 years after", *Recueil des cours de l'Académie de droit international de La Haye 2009* (hereinafter "*Recueil des cours* ..."), vol. 344, pp. 9–133, at pp. 118–119 and 126–128.

[5] On the meaning of the term "rules" in this context: see *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 217–220 (Commentary, introduction); R.K. Gardiner, *Treaty Interpretation*, 2nd edition (Oxford, Oxford University Press, 2015), pp. 36–38.

[6] *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 223, commentary to draft article 28, para. (19); H. Waldock, third report on the law of treaties, *Yearbook ... 1964*, vol. II, document A/CN.4/167 and Add.1-3, pp. 58–59, para. 21; M.K. Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le droit des traités", *Recueil des cours ... 1976-III*, vol. 151, pp. 1–114, at p. 78; I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester, Manchester University Press, 1984), pp. 141–142; Villiger, "The 1969 Vienna Convention ..." (see footnote 4 above), pp. 127–128.

Paragraph 1, second sentence — the Vienna Convention rules on interpretation and customary international law

(4) The second sentence of paragraph 1 of draft conclusion 2 confirms that the rules enshrined in articles 31 and 32 reflect customary international law.[7] International courts and tribunals have acknowledged the customary character of these rules. This is true, in particular, for the International Court of Justice,[8] the International Tribunal for the Law of the Sea (ITLOS),[9] inter-State arbitral tribunals,[10] the Appellate Body of the World Trade Organization (WTO),[11] the European Court of Human Rights,[12] the Inter-American Court of Human Rights,[13] the Court of Justice of the European Union,[14] and international investment

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[7] Y. le Bouthillier, "Commentary on article 32 of the Vienna Convention", in *The Vienna Conventions on the Law of Treaties: A Commentary*, O. Corten and P. Klein, eds. (Oxford, Oxford University Press, 2011), pp. 841–865, at pp. 843–846, paras. 4–8; P. Daillier, M. Forteau and A. Pellet, *Droit international public*, 8th edition (Paris, L.G.D.J., 2009), pp. 285–286; Gardiner, *Treaty Interpretation* (see footnote 5 above), pp. 13–20; Villiger, "The 1969 Vienna Convention" (see footnote 4 above), pp. 132–133.

[8] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at p. 46, para. 65 (1969 Vienna Convention, art. 31); *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at p. 237, para. 47; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, at pp. 109–110, para. 160; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 174, para. 94; *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004*, p. 12, at p. 48, para. 83; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia), Judgment, I.C.J. Reports 2002*, p. 625, at p. 645, para. 37; *LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 466, at p. 501, para. 99 (1969 Vienna Convention, art. 31); *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at p. 1059, para. 18 (1969 Vienna Convention, art. 31); *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 6, at pp. 21–22, para. 41 (1969 Vienna Convention, art. 31, without expressly mentioning art. 32 of the 1969 Vienna Convention, but referring to supplementary means of interpretation).

[9] *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the area*, case No. 17, Advisory Opinion, 1 February 2011, *ITLOS Reports 2011*, p. 10, at para. 57.

[10] *Award in Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, decision of 24 May 2005, United Nations, *Reports of International Arbitral Awards (UNRIAA)*, vol. XXVII (sales No. E/F.06.V.8), pp. 35–125, at para. 45 (1969 Vienna Convention, arts. 31–32).

[11] Art. 3, para. 2, of the WTO understanding on rules and procedures governing the settlement of disputes provides that "… it serves to … to clarify the existing provisions of [the WTO-covered] agreements in accordance with customary rules of interpretation of public international law" (United Nations, *Treaties Series*, vol. 1869, No. 31874, p. 402), but does not specifically refer to arts. 31 and 32 of the 1969 Vienna Convention. However, the Appellate Body has consistently recognized that arts. 31 and 32 reflect rules of customary international law and has resorted to them by reference to art. 3.2 of the understanding on rules and procedures governing the settlement of disputes. See, for example, WTO Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline (US-Gasoline)*, WT/DS2/AB/R, adopted 20 May 1996, Section III, B (1969 Vienna Convention, art. 31, para 1); WTO Appellate Body Report, *Japan — Taxes on Alcoholic Beverages (Japan-Alcoholic Beverages II)*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, Section D (1969 Vienna Convention, arts. 31–32). See also G. Nolte, "Jurisprudence under special regimes relating to subsequent agreements and subsequent practice: second report for the ILC Study Group on treaties over time", in *Treaties and Subsequent Practice*, G. Nolte, ed. (Oxford, Oxford University Press, 2013), pp. 210–240, at p. 215.

[12] *Golder v. the United Kingdom*, no. 4451/70, 21 February 1975, Series A no. 18, para. 29; *Witold Litwa v. Poland*, no. 26629/95, 4 April 2000, ECHR 2000-III, para. 58 (1969 Vienna Convention, art. 31); *Demir and Baykara v. Turkey* [GC], no. 34503/97, 12 November 2008, ECHR-2008, para. 65 (by implication, 1969 Vienna Convention, arts. 31–33); *Hassan v. United Kingdom* [GC], no. 29750/09, 16 September 2014, ECHR 2014, para. 100.

[13] *The effect of reservations on the entry into force of the American Convention on Human Rights (Arts. 74 and 75)*, Advisory Opinion OC-2/82, 24 September 1982, Inter-Am. Ct. H.R. Series A No. 2, para. 19 (by implication, 1969 Vienna Convention, arts. 31–32); *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Judgment (Merits, Reparations and Costs,), 21 June 2002, Inter-Am. Ct. H.R.

tribunals, including those established by the International Centre for Settlement of Investment Disputes (ICSID)[15] under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.[16] Hence, the rules contained in articles 31 and 32 apply as treaty law (in relation to those States that are parties to the 1969 Vienna Convention), and as customary international law between all States, including to treaties which were concluded before the entry into force of the Vienna Convention.

(5) Article 33 may also be relevant for draft conclusions on the topic of "Subsequent agreements and subsequent practice in relation to the interpretation of treaties". A "subsequent agreement" under article 31, paragraph 3 (a), for example, could be formulated in two or more languages, and there could be questions regarding the relationship of any subsequent agreement to different language versions of the treaty itself. The Commission nevertheless decided not to address such questions, including the question of how far article 33 reflects customary international law.[17]

Paragraph 2 — article 31, paragraph 1

(6) Paragraph 2 of draft conclusion 2 reproduces the text of article 31, paragraph 1, of the 1969 Vienna Convention given its importance for the topic. Article 31, paragraph 1, is the point of departure for any treaty interpretation according to the general rule contained in article 31 as a whole. The reference to it is intended to ensure the balance in the process of interpretation between an assessment of the terms of the treaty in their context and in the light of its object and purpose, on the one hand, and the considerations regarding subsequent agreements and subsequent practice in the present draft conclusions, on the other. The reiteration of article 31, paragraph 1, as a separate paragraph, is not, however, meant to suggest that this paragraph, and the means of interpretation mentioned therein, possess a primacy in substance within the context of article 31 itself. All means of interpretation in article 31, including the elements of context mentioned in paragraph 2, are part of a single integrated rule.[18]

Series C No. 94, para. 19 (1969 Vienna Convention, art. 31, para. 1); more decisions are referred to by C.E. Arévalo Narváez, P.A. Patarroyo Ramírez, "Treaties over time and human rights: a case law analysis of the Inter-American Court of Human Rights", *Anuario Colombiano de Derecho Internacional* (2017), pp. 295–331, at p. 315, footnote 88.

[14] Judgment of 25 February 2010, Case C-386/08, *Brita GmbH v. Hauptzollamt Hamburg-Hafen*, *European Court Reports 2010 I-01289*, paras. 41–43 (1969 Vienna Convention, art. 31).

[15] *National Grid plc v. Argentine Republic*, decision on jurisdiction (UNCITRAL), 20 June 2006, para. 51 (1969 Vienna Convention, arts. 31–32); *Canfor Corporation v. United States of America, and Tembec et al. v. United States of America, and Terminal Forest Products Ltd. v. United States of America*, Order of the Consolidation Tribunal, 7 September 2005, para. 59 (1969 Vienna Convention, arts. 31–32); see *The Renco Group Inc. v. Republic of Peru*, partial award on jurisdiction, 15 July 2016, ICSID Case No. UNCT/13/1, para. 69; *Venezuela US, S.R.L. v. Bolivarian Republic of Venezuela*, interim award on jurisdiction, 26 July 2016, PCA Case No. 2013-34, para. 49.

[16] United Nations, *Treaty Series*, vol. 575, No. 8359, p. 159.

[17] The International Court of Justice has recognized that paragraph 4 of article 33 reflects customary international law, *LaGrand* (see footnote 8 above), p. 502, para. 101; the WTO Appellate Body has held that the rules in paragraphs 3 and 4 reflect customary law, WTO Appellate Body Report, *United States — Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada (US — Softwood Lumber IV)*, WT/DS257/AB/R, adopted 17 February 2004, para. 59 (1969 Vienna Convention, art. 33, para. 3); WTO Appellate Body Report, *Chile — Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R and Corr.1, adopted 23 October 2002, para. 271 (1969 Vienna Convention, art. 33 (4)); ITLOS and the European Court of Human Rights have gone one step further and stated that article 33 as a whole reflects customary law, see *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* (see footnote 9 above); *Golder v. the United Kingdom* (see footnote 12 above), para. 29; *Witold Litwa v. Poland* (see footnote 12 above), para. 59; *Demir and Baykara v. Turkey* [GC] (see footnote 12 above), para. 65 (1969 Vienna Convention, arts. 31–33).

[18] *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 219–220, para. (8). See, in detail, below para. (12) of the commentary to draft conclusion 2, para. 5.

Paragraph 3 — article 31, paragraph 3

(7) Paragraph 3 reproduces the language of article 31, paragraph 3 (a) and (b), of the 1969 Vienna Convention, in order to situate subsequent agreements and subsequent practice, as the main focus of the topic, within the general legal framework of the interpretation of treaties. Accordingly, the chapeau of article 31, paragraph 3, "[t]here shall be taken into account, together with the context", is maintained in order to emphasize that the assessment of the means of interpretation mentioned in paragraph 3 (a) and (b) of article 31 are an integral part of the general rule of interpretation set forth in article 31.[19]

Paragraph 4 —subsequent practice under article 32

(8) Paragraph 4 clarifies that subsequent practice in the application of the treaty, which does not meet all criteria of article 31, paragraph 3 (b), nevertheless falls within the scope of article 32. Article 32 includes a non-exhaustive list of supplementary means of interpretation.[20] Paragraph 4 borrows the language "recourse may be had" from article 32 to maintain the distinction between the mandatory character of the taking into account of the means of interpretation, which are referred to in article 31, and the discretionary nature of the use of the supplementary means of interpretation under article 32.

(9) In particular, subsequent practice in the application of the treaty, which does not establish the agreement of all parties to the treaty, but only of one or more parties, may be used as a supplementary means of interpretation. This was stated by the Commission,[21] and has since been recognized by international courts and tribunals,[22] and in the literature[23] (see in more detail paragraphs (23) to (37) of the commentary to draft conclusion 4).

(10) The Commission did not, however, consider that subsequent practice which is not "in the application of the treaty" should be dealt with, in the present draft conclusions, as a supplementary means of interpretation. Such practice may, however, under certain

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[19] *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 220, para. (8); and G. Nolte, "Jurisprudence of the International Court of Justice and arbitral tribunals of *ad hoc* jurisdiction relating to subsequent agreements and subsequent practice: introductory report for the ILC Study Group on treaties over time", in Nolte, *Treaties and Subsequent Practice* (see footnote 11 above), p. 169, at p. 177.

[20] Yasseen, "L'interprétation des traités ..." (see footnote 6 above), p. 79.

[21] *Yearbook ... 1964*, vol. II, document A/5809, pp. 203–204, commentary to draft article 69, para. (13).

[22] *Kasikili/Sedudu Island* (see footnote 8 above), p. 1096, paras. 79–80; *Loizidou v. Turkey* (preliminary objections), no. 15318/89, 23 March 1995, ECHR Series A no. 310, paras. 79–81; *Hilaire, Constantine and Benjamin et al.* (see footnote 13 above), para. 92; *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, provisional measures, order of 27 August 1999, *ITLOS Reports 1999*, p. 280, at para. 50; WTO Appellate Body Report, *European Communities — Customs Classification of Certain Computer Equipment (EC — Computer Equipment)*, WT/DS62/AB/R, WT/DS67/AB/R and WT/DS68/AB/R, adopted 22 June 1998, para. 90; see also WTO Appellate Body Report, *United States — Certain Country of Origin Labelling (COOL) Requirements (US — COOL)*, WT/DS384/AB/R and WT/DS386/AB/R, adopted 23 July 2012, para. 452.

[23] Yasseen, "L'interprétation des traités ..." (see footnote 6 above), p. 52 ("... la Convention de Vienne ne retient pas comme élément de la règle générale d'interprétation la pratique ultérieure en général, mais une pratique ultérieure spécifique, à savoir *une pratique ultérieure non seulement concordante, mais également commune à toutes les parties. ... Ce qui reste de la pratique ultérieure peut être un moyen complémentaire d'interprétation, selon l'article 32 de la Convention de Vienne*") (emphasis added); Sinclair, *The Vienna Convention ...* (see footnote 6 above), p. 138: "... paragraph 3 (b) of [a]rticle 31 of the Convention [covers] ... only a specific form of subsequent practice — that is to say, *concordant subsequent practice common to all the parties. Subsequent practice which does not fall within this narrow definition may nonetheless constitute a supplementary means of interpretation with the meaning of [a]rticle 32 of the Convention*" (emphasis added); S. Torres Bernárdez, "Interpretation of treaties by the International Court of Justice following the adoption of the 1969 Vienna Convention on the law of treaties" in *Liber Amicorum: Professor Ignaz Seidl-Hohenveldern, in honour of his 80th birthday*, G. Hafner and others, eds. (The Hague, Kluwer Law International, 1998), p. 721, at p. 726; M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden, Martinus Nijhoff, 2009), pp. 431–432.

circumstances also be a relevant supplementary means of interpretation.[24] But such practice is beyond what the Commission now addresses under the present topic, except insofar as it may contribute to "assessing" relevant subsequent practice in the application of a treaty (see draft conclusion 5 and accompanying commentary). Thus, paragraph 4 of draft conclusion 2 requires that any subsequent practice be "in the application of the treaty", as does paragraph 3 of draft conclusion 4, which defines "subsequent practice under article 32".

Paragraph 5 — "a single combined operation"

(11) The Commission considered it important to complete draft conclusion 2 by emphasizing in paragraph 5[25] that, notwithstanding the structure of draft conclusion 2, moving from the general to the more specific, the process of interpretation is a "single combined operation", which requires that "appropriate emphasis" be placed on various means of interpretation.[26] The expression "single combined operation" is drawn from the Commission's commentary to the 1966 draft articles on the law of treaties.[27] There, the Commission also stated that it intended "to emphasize that the process of interpretation is a unity".[28]

(12) Paragraph 5 of draft conclusion 2 also explains that appropriate emphasis must be placed, in the course of the process of interpretation as a "single combined operation", on the various means of interpretation, which are referred to in articles 31 and 32 of the 1969 Vienna Convention. The Commission did not, however, consider it necessary to include a reference, by way of example, to one or more specific means of interpretation in the text of paragraph 5 of draft conclusion 2.[29] This avoids a possible misunderstanding that any one of the different means of interpretation has priority over others, regardless of the specific treaty provision or the case concerned.

(13) Paragraph 5 uses the term "means of interpretation". This term captures not only the "supplementary means of interpretation", which are referred to in article 32, but also the elements mentioned in article 31.[30] Whereas the Commission, in its commentary to the draft articles on the law of treaties, used the terms "means of interpretation" and "elements of interpretation" interchangeably, for the purpose of the present topic the Commission retained the term "means of interpretation" because it also describes their function in the process of interpretation as a tool or an instrument.[31] The term "means" does not set apart from each other the different elements, which are mentioned in articles 31 and 32. It rather indicates that these elements each have a function in the process of interpretation, which is a "single", and at the same time a "combined", operation.[32] Just as courts typically begin their reasoning by looking at the terms of the treaty, and then continue, in an interactive

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[24] L. Boisson de Chazournes, "Subsequent practice, practices, and 'family resemblance': towards embedding subsequent practice in its operative milieu", in Nolte, *Treaties and Subsequent Practice* (see footnote 11 above), pp. 53–63, at pp. 59–62.

[25] A/CN.4/660, para. 64; and Nolte, "Jurisprudence of the International Court of Justice ..." (see footnote 19 above), pp. 171 and 177.

[26] On the different function of subsequent agreements and subsequent practice in relation to other means of interpretation, see A/CN.4/660, paras. 42–57; and Nolte, "Jurisprudence of the International Court of Justice ..." (see footnote 19 above), p. 183.

[27] *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 219–220, para. (8).

[28] *Ibid.*

[29] This had been proposed by the Special Rapporteur in his first report, see A/CN.4/660, para. 28: "Draft conclusion 1 (General rule and means of treaty interpretation) ... The interpretation of a treaty in a specific case may result in a different emphasis on the various means of interpretation contained in articles 31 and 32 of the Vienna Convention, in particular on the text of the treaty or on its object and purpose, depending on the treaty or on the treaty provisions concerned." See also the analysis in the first report (*ibid.*, paras. 8–27).

[30] See also above the commentary to draft conclusion 2, para. (1); and Villiger, "The 1969 Vienna Convention ... "(see footnote 4 above), p. 129; Daillier, Forteau and Pellet, *Droit international public* (see footnote 7 above), pp. 284–289.

[31] Provisional summary record of the 3172nd meeting, 31 May 2013 (A/CN.4/SR.3172), p. 4.

[32] *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 219–220, para. (8).

process,[33] to analyse those terms in their context and in the light of the object and purpose of the treaty,[34] the precise relevance of different means of interpretation must first be identified in any case of treaty interpretation before they can be "thrown into the crucible"[35] in order to arrive at a proper interpretation, by giving them appropriate weight in relation to each other.

(14) The obligation to place "appropriate emphasis on the various means of interpretation" may, in the course of the interpretation of a treaty in specific cases, result in a different emphasis on the various means of interpretation depending on the treaty or treaty provisions concerned.[36] This is not to suggest that a court or any other interpreter is more or less free to choose how to use and apply the different means of interpretation. What guides the interpretation is the evaluation by the interpreter, which consists in identifying the relevance of different means of interpretation in a specific case and in determining their interaction with the other means of interpretation in this case by placing a proper emphasis on them in good faith, as required by the rule to be applied.[37] Draft conclusion 9 on the weight of subsequent agreements and subsequent practice as a means of interpretation, and the commentary thereto, provide some guidance for the required evaluation.

(15) Draft conclusion 2 does not refer to the "nature" of the treaty as a factor that would typically be relevant in determining whether more or less weight should be given to certain means of interpretation.[38] The jurisprudence of different international courts and tribunals nevertheless suggests that the "nature" of the treaty may sometimes be relevant for the interpretation of a treaty.[39] The concept of the "nature" of a treaty is not alien to the 1969

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[33] *Ibid.*

[34] *Ibid.*, p. 219, para. (6). See also Yasseen, "L'interprétation des traités ..." (footnote 6 above), p. 58; Sinclair, *The Vienna Convention* ... (footnote 6 above), p. 130; J. Klabbers, "Treaties, object and purpose", *Max Planck Encyclopedia on Public International Law* (www.mpepil.com), para. 7; Villiger, *Commentary* ... (see footnote 23 above), p. 427, para. 11; *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, Judgment, *I.C.J. Reports 1988*, p. 69, at p. 89, paras. 45–46; *Delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, decision of 30 June 1977, UNRIAA, vol. XVIII (sales No. E/F.80.V.7), pp. 3–413, at pp. 32–35, para. 39.

[35] *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 220.

[36] Draft conclusion 1, para. 2, as proposed in document A/CN.4/660, para. 28, and, generally, paras. 10–27.

[37] Decisions of domestic courts have not been uniform as regards the relative weight that subsequent agreements and subsequent practice possess in the process of treaty interpretation, see United Kingdom of Great Britain and Northern Ireland, House of Lords: *R (Mullen) v. Secretary of State for the Home Department* [2004] UKHL 18, paras. 47–48 (Lord Steyn); *Deep Vein Thrombosis and Air Travel Group Litigation* [2005] UKHL 72, para. 31 (Lord Steyn). United States of America, Supreme Court: *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982), pp. 183–185; *O'Connor v. United States*, 479 U.S. 27 (1986), pp. 31–32; *United States v. Stuart*, 489 U.S. 353 (1989), where a dissenting judge (Justice Scalia) criticized the majority of the Court for relying on "[t]he practice of the treaty signatories", which, according to him, need not be consulted, since when the "Treaty's language resolves the issue presented, there is no necessity of looking further", at p. 371. Switzerland: Federal Administrative Court, judgment of 21 January 2010, BVGE 2010/7, para 3.7.11; Federal Supreme Court, *A v. B*, appeal judgment of 8 April 2004, No. 4C.140/2003, BGE, vol. 130 III, p. 430, at p. 439.

[38] Draft conclusion 1, para. 2, as proposed in the first report (A/CN.4/660), para. 28, and analysis at paras. 8–28.

[39] WTO Panels and the Appellate Body, for example, seem to emphasize more the terms of the respective WTO-covered agreement (for example, WTO Appellate Body, *Brazil — Export Financing Programme for Aircraft, Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/AB/RW, adopted 4 August 2000, para. 45), whereas the European Court of Human Rights and the Inter-American Court of Human Rights highlight the character of the Convention as a human rights treaty (for example, *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, ECHR 2005-I, para. 111; *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, 1 October 1999, Inter-Am. Ct. H.R. Series A No. 16, para. 58); see also *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10 and Add.1), pp. 281–282, and Nolte, "Jurisprudence under special regimes ..." (see footnote 11 above), p. 210, at pp. 216, 244–246, 249–262 and 270–275.

Vienna Convention (see, for example, article 56, paragraph 1 (a))[40] and a reference to the "nature" of the treaty and/or of treaty provisions has been included in other work of the Commission.[41] The Commission, however, decided that the draft conclusion should not refer to the "nature" of the treaty in order not to call into question the unity of the interpretation process and to avoid any categorization of treaties. It is, in any case, difficult to distinguish the "nature of the treaty" from the object and purpose of the treaty.[42]

Conclusion 3
Subsequent agreements and subsequent practice as authentic means of interpretation

Subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), being objective evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31.

Commentary

(1) By characterizing subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), of the 1969 Vienna Convention as "authentic means of interpretation", the Commission indicates the reason why those means are significant for the interpretation of treaties.[43] The Commission thereby follows its 1966 commentary on the draft articles on the law of treaties, which described subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), as "authentic means of interpretation" and which underlined that:

> "The importance of such subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty."[44]

(2) Subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), are, however, not the only "authentic means of interpretation". As the Commission has explained:

> "… the Commission's approach to treaty interpretation was on the basis that the text of the treaty must be presumed to be the authentic expression of the intentions of the parties, … making the ordinary meaning of the terms, the context of the treaty, its objects and purposes, and the general rules of international law, together with

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[40] M. Forteau, "Les techniques interprétatives de la Cour internationale de Justice", *Revue générale de droit international public*, vol. 115 (2011), p. 399, at pp. 406–407 and 416; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, Separate Opinion of Judge Dillard, p. 150, at p. 154, footnote 1.

[41] Articles on the effects of armed conflicts on treaties (art. 6 (a)), General Assembly resolution 66/99 of 9 December 2011, annex; see also the guide to practice on reservations to treaties, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10 and Add.1); guideline 4.2.5 refers to the nature of obligations of the treaty, rather than the nature of the treaty as such.

[42] See e.g. the commentary to guideline 4.2.5 (para. (3) of the guide to practice on reservations to treaties, in *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10 and Add.1)). On the other hand, art. 6 of the articles on the effects of armed conflicts on treaties suggests "a series of factors pertaining to the nature of the treaty, particularly its subject matter, its object and purpose, its content and the number of the parties to the treaty", *ibid.*, commentary to draft article 6, para. (3).

[43] See R. Jennings and A. Watts, eds., *Oppenheim's International Law*, 9th edition, vol. 1 (Harlow, Longman, 1992), p. 1268, para. 630; G. Fitzmaurice, "The law and procedure of the International Court of Justice 1951-4: treaty interpretation and certain other treaty points", *British Yearbook of International Law 1957*, vol. 33, pp. 203–293, at pp. 223–225; WTO Panel Report, *United States — Measures Affecting Trade in Large Civil Aircraft (second complaint) (US — Large Civil Aircraft (2nd Complaint))*, WT/DS353/R, adopted 23 March 2012, para. 7.953.

[44] See *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 221, para. (15).

> authentic interpretations by the parties, the primary criteria for interpreting a treaty".[45]

The term "authentic" thus refers to different forms of "objective evidence" or "proof" of conduct of the parties, which reflects the "common understanding of the parties" as to the meaning of the treaty.

(3) By describing subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), as "authentic" means of interpretation, the Commission recognizes that the common will of the parties, which underlies the treaty, possesses a specific authority regarding the identification of the meaning of the treaty, even after the conclusion of the treaty. The 1969 Vienna Convention thereby accords the parties to a treaty a role that may be uncommon for the interpretation of legal instruments in some domestic legal systems.

(4) The character of subsequent agreements and subsequent practice of the parties under article 31, paragraph 3 (a) and (b), as "authentic means of interpretation" does not, however, imply that these means necessarily possess a conclusive, or legally binding, effect. According to the chapeau of article 31, paragraph 3, subsequent agreements and subsequent practice shall, after all, only "be taken into account" in the interpretation of a treaty, which consists of a "single combined operation" with no hierarchy among the means of interpretation that are referred to in article 31 (see draft conclusion 2, paragraph 5).[46] For this reason, and notwithstanding the suggestions of some commentators,[47] subsequent agreements and subsequent practice that establish the agreement of the parties regarding the interpretation of a treaty are not necessarily conclusive or legally binding.[48] This is confirmed in draft conclusion 9, paragraph 1. Thus, when the Commission characterized a "subsequent agreement" as representing "an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation",[49] it did not go quite as far as saying that such an interpretation is necessarily conclusive in the sense that it overrides all other means of interpretation.

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[45] *Yearbook ... 1964*, vol. II, document A/5809, pp. 204–205, para. (15); see also *ibid.*, pp. 203–204, para. 13: "Paragraph 3 specifies as *further* authentic elements of interpretation: (a) agreements between the parties regarding the interpretation of the treaty, and (b) any subsequent practice in the application of the treaty which clearly established the understanding of all the parties regarding its interpretation" (emphasis added); on the other hand, Waldock explained in his third report that "... *travaux préparatoires* are not, as such, an authentic means of interpretation". See *ibid.*, document A/CN.4/167 and Add.1-3, pp. 58–59, para. (21).

[46] *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 219–220, paras. (8) and (9).

[47] M.E. Villiger, "The rules on interpretation: misgivings, misunderstandings, miscarriage? The 'crucible' intended by the International Law Commission", in *The Law of Treaties beyond the Vienna Convention*, E. Cannizzaro, ed. (Oxford, Oxford University Press, 2011), pp. 105–122, at p. 111; Gardiner, *Treaty Interpretation* (see footnote 5 above), p. 34; O. Dörr, "Article 31, general rule of interpretation", in *Vienna Convention on the Law of Treaties. A commentary*, 2nd ed., O. Dörr and K. Schmalenbach, eds. (Berlin, Springer, 2018), pp. 559–616, at pp. 593–594, paras. 72–76; K. Skubiszewski, "Remarks on the interpretation of the United Nations Charter", in *Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte — Festschrift für Hermann Mosler*, R. Bernhardt and others, eds. (Berlin, Springer, 1983), pp. 891–902, at p. 898.

[48] H. Fox, "Article 31 (3) (a) and (b) of the Vienna Convention and the *Kasikili Sedudu Island* Case", in *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on*, M. Fitzmaurice, O. Elias and P. Merkouris, eds. (Leiden, Martinus Nijhoff, 2010), pp. 59–74, at pp. 61–62; A. Chanaki, *L'adaptation des traités dans le temps* (Brussels, Bruylant, 2013), pp. 313–315; M. Benatar, "From probative value to authentic interpretation: the legal effects of interpretative declarations", *Revue belge de droit international*, vol. 44 (2011), pp. 170–195, at pp. 194–195; cautious: J.M. Sorel and B. Eveno "1969 Vienna Convention, Article 31: General rule of interpretation", in Corten and Klein, *The Vienna Conventions ...* (see footnote 7 above), pp. 804–837, at p. 825, paras. 42–43; see also G. Nolte, "Subsequent agreements and subsequent practice of States outside of judicial or quasi-judicial proceedings", in Nolte, *Treaties and Subsequent Practice* (see footnote 11 above), pp. 307–385, at p. 375, para. 16.4.3.

[49] *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 221, para. (14).

(5) This does not exclude that the parties to a treaty, if they wish, may reach a binding agreement regarding the interpretation of a treaty. The Special Rapporteur on the law of treaties, Sir Humphrey Waldock, stated in his third report that it may be difficult to distinguish subsequent practice of the parties under what became article 31, paragraph 3 (a) and (b) — which is only to be taken into account, among other means, in the process of interpretation — and a later agreement that the parties consider to be binding:

> "Subsequent practice when it is consistent and embraces all the parties would appear to be decisive of the meaning to be attached to the treaty, *at any rate* when it indicates that the parties consider the interpretation to be binding upon them. In these cases, subsequent practice as an element of treaty interpretation and as an element in the formation of a tacit agreement overlap and the meaning derived from the practice becomes an authentic interpretation established by agreement."[50] (emphasis added)

Whereas Waldock's original view that (simple) agreed subsequent practice "would appear to be decisive of the meaning" was ultimately not adopted in the 1969 Vienna Convention, subsequent agreements and subsequent practice establishing the agreement of the parties regarding the interpretation of a treaty must be conclusive regarding such interpretation when "the parties consider the interpretation to be binding upon them". It is, however, possible that provisions of domestic law prohibit the Government of a State from arriving at a binding agreement in such cases without satisfying certain — mostly procedural — requirements under its constitution,[51] without such domestic law affecting, as a general rule, the binding character of an agreement under international law (see article 46 of the 1969 Vienna Convention).

(6) The possibility of arriving at a binding subsequent interpretative agreement by the parties is particularly clear in cases in which the treaty itself so provides. Article 1131, paragraph 2, of the North American Free Trade Agreement (NAFTA), for example, provides that: "An interpretation by the [inter-governmental] Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section."[52] The existence of such a special procedure or an agreement regarding the authoritative interpretation of a treaty that the parties consider binding may or may not preclude additional recourse to subsequent agreements or subsequent practice under article 31, paragraph 3 (a) and (b), of the 1969 Vienna Convention.[53]

(7) The Commission has continued to use the term "authentic means of interpretation" in order to describe the not necessarily conclusive, but more or less authoritative, character of subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b). The Commission has not employed the terms "authentic interpretation" or "authoritative interpretation" in draft conclusion 3 since these concepts are often understood to mean a

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[50] *Yearbook ... 1964*, vol. II, document A/CN.4/167 and Add.1-3, p. 60, para. (25).

[51] See, for example, Germany, Federal Fiscal Court, BFHE, vol. 181, p. 158, at p. 161; and *ibid.*, vol. 219, pp. 518 *et seq.*, at pp. 527–528.

[52] North American Free Trade Agreement between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States (1992) (Washington, D.C., United States Government Printing Office, 1993); *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL Arbitration under NAFTA Chapter Eleven, award, 24 March 2016, PCA Case No. 2012-17, paras. 478–480.

[53] See also: the Marrakesh Agreement establishing the World Trade Organization (1994), United Nations, *Treaty Series*, vol. 1867, No. 31874, p. 3, art. IX, para. 2; WTO Appellate Body Report, *European Communities — Custom Classification of Frozen Boneless Chicken Cuts (EC — Chicken Cuts)*, WT/DS269/AB/R and Corr.1, WT/DS286/AB/R and Corr.1, adopted 27 September 2005, para. 273; WTO Appellate Body Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas, Second Recourse to Article 21.5 of the DSU by Ecuador (EC — Bananas III)*, Second Recourse to Article 21.5, WT/DS27/AB/RW2/ECU and Corr.1, adopted 11 December 2008, WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008, paras. 383 and 390.

necessarily conclusive, or binding, agreement between the parties regarding the interpretation of a treaty.[54]

(8) Domestic courts have sometimes explicitly recognized that subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), are "authentic" means of interpretation.[55] They have, however, not always been consistent regarding the legal consequences that this characterization entails. Whereas some courts have assumed that subsequent agreements and practice by the parties under the treaty may produce certain binding effects,[56] others have rightly emphasized that article 31, paragraph 3, only requires that subsequent agreements and subsequent practice "be taken into account".[57]

(9) The term "authentic means of interpretation" encompasses a factual and a legal element. The factual element is indicated by the expression "objective evidence", whereas the legal element is contained in the concept of "understanding of the parties". Accordingly, the Commission characterized a "subsequent agreement" as representing "an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation",[58] and stated that subsequent practice "similarly … constitutes objective evidence of the understanding of the parties as to the meaning of the treaty".[59] Given the character of treaties as embodiments of the common will of their parties, "objective evidence" of the "understanding of the parties" possesses considerable authority as a means of interpretation.[60]

(10) The distinction between any "subsequent agreement" (article 31, paragraph 3 (a)) and "subsequent practice … which establishes the agreement of the parties" (article 31, paragraph 3 (b)) does not denote a difference concerning their authentic character.[61] The Commission rather considers that a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" *ipso facto* has the effect of constituting an authentic interpretation of the treaty, whereas a "subsequent practice" only has this effect if it "shows the common understanding of the parties as to the meaning of the terms".[62] Thus, the difference between a "subsequent agreement between the parties" and a "subsequent practice … which establishes the agreement of the parties" lies in the

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[54] See, for example, *Methanex Corporation v. United States of America*, UNCITRAL Arbitration under NAFTA Chapter Eleven, Final Award on Jurisdiction and Merits, 3 August 2005, Part II, chap. H, para. 23 (with reference to Jennings and Watts (see footnote 43 above), p. 1268, para. 630); Gardiner, *Treaty Interpretation* (see footnote 5 above), p. 34; U. Linderfalk, *On the Interpretation of Treaties* (Dordrecht, Springer, 2007), p. 153; Skubiszewski, "Remarks on the interpretation of the United Nations Charter" (see footnote 47 above), p. 898; G. Haraszti, *Some Fundamental Problems of the Law of Treaties* (Budapest, Akadémiai Kiadó, 1973), p. 43; see also Nolte, "Jurisprudence under special regimes … (see footnote 11 above), p. 210, at p. 240, para. 4.5.

[55] Switzerland Federal Supreme Court: *A v. B*, appeal judgment of 8 April 2004, No. 4C.140/2003, BGE, vol. 130 III, p. 430, at p. 439 (where the Court speaks of the parties as being "masters of the treaty" ("Herren der Verträge"); judgment of 12 September 2012, No. 2C_743/2011, BGE, vol. 138 II, p. 524, at pp. 527–528. Germany, Federal Constitutional Court, BVerfGE, vol. 90, p. 286, at p. 362. See also India, Supreme Court, *Godhra Electricity Co. Ltd. and Another v. The State of Gujarat and Another* [1975] AIR 32. Available from http://indiankanoon.org/doc/737188 (accessed 8 June 2016).

[56] Germany, Federal Fiscal Court, BFHE, vol. 215, p. 237, at p. 241; *ibid.*, vol. 181, p. 158, at p. 161.

[57] New Zealand, Court of Appeal, *Zaoui v. Attorney-General (No. 2)* [2005] 1 NZLR 690, para. 130; Hong Kong, China, Court of Final Appeal, *Ng Ka Ling and Others v. Director of Immigration* [1999] 1 HKLRD 315, 354; Austria, Supreme Administrative Court, VwGH, judgment of 30 March 2006, 2002/15/0098, 2, 5.

[58] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 221, para. (14).

[59] *Ibid.*, para. (15).

[60] Gardiner, *Treaty Interpretation* (see footnote 5 above), pp. 34 and 414–415; Linderfalk, *On the Interpretation of Treaties* (see footnote 54 above), pp. 152–153.

[61] A/CN.4/660, para. 69.

[62] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, pp. 221–222, para. (15); see also W. Karl, *Vertrag und spätere Praxis im Völkerrecht* (Berlin, Springer, 1983), p. 294.

manner of establishing the agreement of the parties regarding the interpretation of a treaty, with the difference being in the greater ease with which an agreement is established.[63]

(11) Subsequent agreements and subsequent practice as authentic means of treaty interpretation are not to be confused with interpretations of treaties by international courts, tribunals or expert treaty bodies in specific cases. Subsequent agreements or subsequent practice under article 31, paragraph 3 (a) and (b), are "authentic" means of interpretation because they are expressions of the understanding of the treaty by the parties themselves. The authority of international courts, tribunals and expert treaty bodies rather derives from other sources, most often from the treaty that is to be interpreted. Judgments and other pronouncements of international courts, tribunals and expert treaty bodies, however, may be indirectly relevant for the identification of subsequent agreements and subsequent practice as authentic means of interpretation if they refer to, reflect or trigger such subsequent agreements and practice of the parties themselves.[64]

(12) Draft conclusions 2 and 4 distinguish between "subsequent practice" establishing the agreement of the parties under article 31, paragraph 3 (b), of the 1969 Vienna Convention, on the one hand, and subsequent practice (in a broad sense) by one or more, but not all, parties to the treaty that may be relevant as a supplementary means of interpretation under article 32.[65] Such subsequent practice under article 32 that does not establish the agreement of all the parties cannot constitute an "authentic" interpretation of a treaty by all its parties and thus will not possess the same weight for the purpose of interpretation (see draft conclusion 9).[66]

(13) The last part of draft conclusion 3 makes it clear that any reliance on subsequent agreements and subsequent practice as authentic means of interpretation should occur as part of the application of the general rule of treaty interpretation reflected in article 31 of the 1969 Vienna Convention.

Conclusion 4
Definition of subsequent agreement and subsequent practice

1. A subsequent agreement as an authentic means of interpretation under article 31, paragraph 3 (a), is an agreement between the parties, reached after the conclusion of a treaty, regarding the interpretation of the treaty or the application of its provisions.

2. A subsequent practice as an authentic means of interpretation under article 31, paragraph 3 (b), consists of conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty.

3. A subsequent practice as a supplementary means of interpretation under article 32 consists of conduct by one or more parties in the application of the treaty, after its conclusion.

Commentary

General aspects

(1) Draft conclusion 4 defines the three different "subsequent" means of treaty interpretation that are mentioned in draft conclusion 2, paragraphs 3 and 4, namely "subsequent agreement" under article 31, paragraph 3 (a), "subsequent practice" under article 31, paragraph 3 (b), and "subsequent practice" under article 32.

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[63] *Kasikili/Sedudu Island* (see footnote 8 above), at p. 1087, para. 63, see also below draft conclusion 4 and the commentary thereto.

[64] See below draft conclusion 12 and Nolte, "Subsequent agreements and subsequent practice of States ..." (footnote 48 above), p. 307, at pp. 381 *et seq.*, para. 17.3.1.

[65] See below in particular paras. (23) to (37) of the commentary to draft conclusion 4, para. 3.

[66] See below also para. (35) of the commentary to draft conclusion 4, para. 3.

(2) In all three cases, the term "subsequent" refers to acts occurring "after the conclusion of a treaty".[67] This point in time is often earlier than the moment when the treaty enters into force (article 24 of the 1969 Vienna Convention). Various provisions of the 1969 Vienna Convention (for example, article 18) show that a treaty may be "concluded" before its actual entry into force.[68] For the purposes of the present topic, "conclusion" is whenever the text of the treaty has been established as definitive within the meaning of article 10 of the Vienna Convention. It is after conclusion, not just after entry into force, of a treaty when subsequent agreements and subsequent practice can occur. Indeed, it is difficult to identify a reason why an agreement or practice that takes place between the moment when the text of a treaty has been established as definitive and the entry into force of that treaty should not be relevant for the purpose of interpretation.[69]

(3) Article 31, paragraph 2, of the 1969 Vienna Convention provides that the "context" of the treaty includes certain "agreements" and "instruments"[70] that "are made in connection with the conclusion of the treaty". The phrase "in connection with the conclusion of the treaty" should be understood as including agreements and instruments that are made in a close temporal and contextual relation with the conclusion of the treaty.[71] If they are made after this period, then such "agreements" and agreed upon "instruments" constitute "subsequent agreements" or subsequent practice under article 31, paragraph 3.[72]

Paragraph 1 — definition of "subsequent agreement" under article 31, paragraph 3 (a)

(4) Paragraph 1 of draft conclusion 4 provides the definition of a "subsequent agreement" under article 31, paragraph 3 (a). The term "the parties" indicates that such an agreement must be reached between all the parties to the treaty.

(5) Article 31, paragraph 3 (a), uses the term "subsequent agreement" and not the term "subsequent treaty". A "subsequent agreement" is, however, not necessarily less formal than a "treaty". Whereas a treaty within the meaning of the 1969 Vienna Convention must be in written form (article 2, paragraph 1 (a)), the customary international law on treaties knows no such requirement.[73] The term "agreement" in the 1969 Vienna Convention[74] and in customary international law does not imply any particular degree of formality. Article 39 of the 1969 Vienna Convention, which lays down the general rule according to which: "[a]

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[67] *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 221, para. (14).

[68] See J.L. Brierly, second report on the law of treaties, *Yearbook ... 1951*, vol. II, document A/CN.4/43, pp. 70 *et seq.*; and G.G. Fitzmaurice, first report on the law of treaties, *Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 112; see also S. Rosenne, "Treaties, conclusion and entry into force", in *Encyclopedia of Public International Law*, vol. IV, R. Bernhardt, ed. (Amsterdam, North Holland, 2000), p. 933 ("Strictly speaking it is the negotiation that is concluded through a treaty"); Villiger, *Commentary ...* (see footnote 23 above), pp. 78–80, paras. 9–14.

[69] See, for example, Declaration on the European Stability Mechanism, agreed on by the Contracting Parties to the Treaty Establishing the Stability Mechanism, 27 September 2012.

[70] See *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 221, para. (13); the German Federal Constitutional Court has held that this term may include unilateral declarations if the other party did not object to them, see German Federal Constitutional Court, BVerfGE, vol. 40, p. 141, at p. 176; see, generally, Gardiner, *Treaty Interpretation* (footnote 5 above), pp. 240–242.

[71] Yasseen, "L'interprétation des traités ..." (see footnote 6 above), p. 38; Jennings and Watts, *Oppenheim's International Law* (see footnote 43 above), p. 1274, para. 632 ("... but, on the other hand, too long a lapse of time between the treaty and the additional agreement might prevent it being regarded as made in connection with 'the conclusion of' the treaty").

[72] See *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 221, para. (14); see also Villiger, *Commentary ...* (above footnote 23), p. 431, paras. 20–21; see also K.J. Heller, "The uncertain legal status of the aggression understandings", *Journal of International Criminal Justice*, vol. 10 (2012), pp. 229–248, at p. 237.

[73] Villiger, *Commentary ...* (see footnote 23 above), p. 80, para. 15; P. Gautier, "Commentary on article 2 of the Vienna Convention", in Corten and Klein, *The Vienna Conventions ...* (see footnote 7 above), vol. II, pp. 38–40, paras. 14–18; J. Klabbers, *The Concept of Treaty in International Law* (The Hague, Kluwer Law International, 1996), pp. 49–50; see also A. Aust, "The theory and practice of informal international instruments", *International and Comparative Law Quarterly*, vol. 35, No. 4 (1986), pp. 787–812, at pp. 794 *et seq.*

[74] See articles 2, para. 1 (a), 3, 24, para. 2, 39–41, 58 and 60.

treaty may be amended by agreement between the parties", has been explained by the Commission to mean that: "An amending agreement may take whatever form the parties to the original treaty may choose."[75] In the same way, the Vienna Convention does not envisage any particular formal requirements for agreements and practice under article 31, paragraph 3 (a) and (b).[76]

(6) While every treaty is an agreement, not every agreement is a treaty. Indeed, a "subsequent agreement" under article 31, paragraph 3 (a), "shall" only "be taken into account" in the interpretation of a treaty. Therefore, it is not necessarily binding. The question is addressed more specifically in draft conclusion 10.

(7) The 1969 Vienna Convention distinguishes a "subsequent agreement" under article 31, paragraph 3 (a), from "any subsequent practice ... which establishes the agreement of the parties regarding its interpretation" under article 31, paragraph 3 (b). This distinction is not always clear and the jurisprudence of international courts and other adjudicative bodies shows a certain reluctance to assert it. In *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, the International Court of Justice used the expression "subsequent attitudes" to denote both what it later described as "subsequent agreements" and as subsequent unilateral "attitudes".[77] In the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan*, the International Court of Justice left open the question whether the use of a particular map could constitute a subsequent agreement or subsequent practice.[78] WTO Panels and the Appellate Body have also not always distinguished between a subsequent agreement and subsequent practice under article 31, paragraph 3 (a) and (b).[79]

(8) The Tribunal established pursuant to the North American Free Trade Agreement (NAFTA) in *CCFT v. United States*,[80] however, has squarely addressed this distinction. In that case the United States of America asserted that a number of unilateral actions by the

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[75] *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 232 and 233; see also Villiger, *Commentary* ... (footnote 23 above), p. 513, para. 7; P. Sands, "Commentary on article 39 of the Vienna Convention", in Corten and Klein, *The Vienna Conventions* ... (see footnote 7 above), pp. 971–972, paras. 31–34.

[76] Draft article 27, paragraph 3 (*b*), which later became article 31, paragraph 3 (*b*), of the Vienna Convention, contained the word "understanding", which was changed to "agreement" at the United Nations Conference on the Law of Treaties. This change was "related to drafting only", see *Official Records of the United Nations Conference on the Law of Treaties, First session, Vienna 26 March-24 May 1968* (A/CONF.39/11, sales No. E.68.V.7), p. 169; Fox, "Article 31 (3) (a) and (b) ..." (see footnote 48 above), p. 63.

[77] See *Territorial Dispute* (see footnote 8 above), p. 6, at pp. 34 *et seq.*, paras. 66 *et seq.*

[78] *Sovereignty over Pulau Ligitan and Pulau Sipadan* (see footnote 8 above), p. 656, para. 61; in the *Gabčíkovo-Nagymaros* case, the Court spoke of "subsequent positions" in order to establish that "the explicit terms of the treaty itself were, therefore, in practice acknowledged by the parties to be negotiable", *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 77, para. 138, see also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Judgment (Jurisdiction and Admissibility), I.C.J. Reports 1995*, p. 6, at p. 16, para. 28 ("subsequent conduct").

[79] See "Scheduling guidelines" in WTO Panel Report, *Mexico — Measures Affecting Telecommunications Services*, WT/DS204/R, adopted 1 June 2004, and in WTO Appellate Body Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R and Corr.1, adopted 20 April 2005; to qualify a "1981 Understanding" in WTO Panel Report, *United States — Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/R, adopted 20 March 2000; "Tokyo Round SCM Code" in WTO Panel Report, *Brazil — Measures Affecting Desiccated Coconut*, WT/DS22/R, adopted 20 March 1997, and a "waiver" in WTO Appellate Body Report, *EC — Bananas III* (see footnote 53 above).

[80] *C.C.F.T. v. United States*, UNCITRAL Arbitration under NAFTA Chapter Eleven, Award on Jurisdiction, 28 January 2008; see also *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, Decision on the Challenge to the President of the Committee, 3 October 2001, ICSID Case No. ARB/97/3, *ICSID Reports 2004*, vol. 6 (2004), p. 168, at p. 174, para. 12; P. Merkouris and M. Fitzmaurice, "Canons of treaty interpretation: selected case studies from the World Trade Organization and the North American Free Trade Agreement", in Fitzmaurice, Elias and Merkouris, *Treaty Interpretation* ... (see footnote 48 above), pp. 153–238, at pp. 217–233.

three NAFTA parties could, if considered together, constitute a subsequent agreement.[81] In a first step, the Tribunal did not find that the evidence was sufficient to establish such a subsequent agreement under article 31, paragraph 3 (a).[82] In a second step, however, the Tribunal concluded that the very same evidence constituted a relevant subsequent practice that established an agreement between the parties regarding the interpretation:

> "The question remains: is there 'subsequent practice' that establishes the agreement of the NAFTA Parties on this issue within the meaning of article 31 (3) (b)? The Tribunal concludes that there is. Although there is, to the Tribunal, insufficient evidence on the record to demonstrate a 'subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions,' the available evidence cited by the Respondent demonstrates to us that there is nevertheless a 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its applications … .'"[83]

(9) This reasoning suggests that one difference between a "subsequent agreement" and "subsequent practice" under article 31, paragraph 3, lies in the different manifestations of the "authentic" expression of the will of the parties. Indeed, by distinguishing between "any subsequent agreement" under article 31, paragraph 3 (a), and "subsequent practice … which establishes the understanding of the parties" under article 31, paragraph 3 (b), of the 1969 Vienna Convention, the Commission did not intend to denote a difference concerning their possible legal effect.[84] The difference between the two concepts, rather, lies in the fact that a "subsequent agreement between the parties" *ipso facto* has the effect of constituting an authentic means of interpretation of the treaty, whereas a "subsequent practice" only has this effect if its different elements, taken together, show "the common understanding of the parties as to the meaning of the terms".[85]

(10) Subsequent agreements and subsequent practice under article 31, paragraph 3, are hence distinguished based on whether an agreement of the parties can be identified as such, in a common act or undertaking, or whether it is necessary to identify an agreement through different acts that in their coincidental combination demonstrate a common position. A "subsequent agreement" under article 31, paragraph 3 (a), must therefore be "reached" and presupposes a deliberate common act or undertaking by the parties, even if it consists of individual acts by which they manifest their common understanding regarding the interpretation of the treaty or the application of its provisions.

(11) "Subsequent practice" under article 31, paragraph 3 (b), on the other hand, encompasses all (other) relevant forms of subsequent conduct by the parties to a treaty that contribute to the identification of an agreement, or "understanding",[86] of the parties regarding the interpretation of the treaty. It is, however, possible that "practice" and "agreement" coincide in specific cases and cannot be distinguished. This explains why the term "subsequent practice" is sometimes used in a more general sense, which encompasses both means of interpretation that are referred to in article 31, paragraph 3 (a) and (b).[87]

(12) A group of separate subsequent agreements, each between a limited number of parties, but which, taken together, establish an agreement between all the parties to a treaty regarding its interpretation, is not normally "a" subsequent agreement under article 31, paragraph 3 (a). The term "subsequent agreement" under article 31, paragraph 3 (a), should,

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[81] *C.C.F.T. v. United States* (see footnote 80 above), paras. 174–177.

[82] *Ibid.*, paras. 184–187.

[83] *Ibid.*, paras. 188, see also para. 189; and in a similar sense: *Aguas del Tunari SA v. Republic of Bolivia* (Netherlands/Bolivia BIT), Decision on Respondent's Objections to Jurisdiction, ICSID Case No. ARB/02/3, 21 October 2005, *ICSID Review — Foreign Investment Law Journal*, vol. 20, No. 2 (2005), p. 450, at pp. 528 *et seq.*, paras. 251 *et seq.*

[84] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, pp. 221–222, para. (15).

[85] *Ibid.*; see also Karl, *Vertrag und spätere Praxis …* (footnote 62 above), p. 294.

[86] The word "understanding" had been used by the Commission in the corresponding draft article 27, para. 3 (*b*), on the law of treaties (see footnote 76 above).

[87] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, p. 113, at pp. 127–128, para. 53: in this case, even an explicit subsequent verbal agreement was characterized by one of the parties as "subsequent practice".

for the sake of clarity, be limited to a single agreement between all the parties (see above paragraph (10)). Different later agreements between a limited number of parties that, taken together, establish an agreement between all the parties regarding the interpretation of a treaty usually constitute subsequent practice under article 31, paragraph 3 (b). Various such agreements between a limited number of parties that, even taken together, do not establish an agreement between all the parties regarding the interpretation of a treaty may have interpretative value as a supplementary means of interpretation under article 32 (see below at paragraphs (23) and (24)). Thus, the use of the term "subsequent agreement" is limited to agreements among all the parties to a treaty that constitute one single agreement — or in a common act in whatever form that reflects the agreement of all parties.[88]

(13) A subsequent agreement under article 31, paragraph 3 (a), must be an agreement "regarding" the interpretation of the treaty or the application of its provisions. The parties must therefore purport, possibly among other aims, to clarify the meaning of a treaty or how it is to be applied.[89]

(14) Whether an agreement is one "regarding" the interpretation or application of a treaty can sometimes be determined by some reference that links the "subsequent agreement" to the treaty concerned. Such a reference may be explicit, but may also be comprised in a later treaty.[90] In the *Jan Mayen* case between Denmark and Norway, for example, the International Court of Justice appears to have accepted that a "subsequent treaty" between the parties "in the same field" could be used for the purpose of the interpretation of the previous treaty. In that case, however, the Court ultimately declined to use the subsequent treaty for that purpose because it did not in any way "refer" to the previous treaty.[91] In *Dispute Regarding Navigational and Related Rights* between Costa Rica and Nicaragua, Judge *ad hoc* Guillaume referred to a memorandum of understanding between the two States.[92] It was not clear, however, whether this particular memorandum was meant by the parties to serve as an interpretation of the boundary treaty under examination.

(15) The Court of Final Appeal in Hong Kong, China, has provided an example of a rather strict approach when it was called upon to interpret the Sino-British Joint Declaration in the case of *Ng Ka Ling and Others v. Director of Immigration*.[93] In this case, one party alleged that the Sino-British Joint Liaison Group, consisting of representatives of China and the United Kingdom under article 5 of the Joint Declaration, had come to an agreement regarding the interpretation of the Joint Declaration. As evidence, the party pointed to a booklet that stated that it was compiled "on the basis of the existing immigration regulations and practices and the common view of the British and Chinese sides in the [Joint Liaison Group]". The Court, however, did not find that the purpose of the booklet was to "interpret or to apply" the Joint Declaration within the meaning of article 31, paragraph 3 (a).[94]

Paragraph 2 — definition of subsequent practice under article 31, paragraph 3 (b)

(16) Paragraph 2 of draft conclusion 4 does not intend to provide a general definition for any form of subsequent practice that may be relevant for the purpose of the interpretation of

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[88] See WTO Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June, para. 371. A common act may consist of an exchange of letters.

[89] *Ibid.*, paras. 366–378, in particular para. 372: e.g. agreements which are arrived at under a clause in a bilateral tax treaty mirroring article 25, paragraph 3, of the Organization for Economic Cooperation and Development Model Tax Convention; Linderfalk, *On the Interpretation of Treaties* (see footnote 54 above), pp. 164 *et seq*.

[90] *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, award, 25 May 2017, ICSID Case No. ARB/12/35, paras. 302–303.

[91] *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 38, at p. 51, para. 28.

[92] *Dispute regarding Navigational and Related Rights* (see footnote 8 above), Declaration of Judge *ad hoc* Guillaume, p. 290, at pp. 298–299, para. 16.

[93] See *Ng Ka Ling and Others v. Director of Immigration* (footnote 57 above).

[94] *Ibid.*, paras. 152–153.

treaties. Paragraph 2 is limited to subsequent practice as a means of authentic interpretation that establishes the agreement of all the parties to the treaty, as formulated in article 31, paragraph 3 (b). Such subsequent practice (in a narrow sense) is distinguishable from subsequent practice (in a broad sense) under article 32 of the 1969 Vienna Convention by one or more parties that does not establish the agreement of the parties, but which may nevertheless be relevant as a subsidiary means of interpretation (see draft conclusion 4, paragraph 3).[95]

(17) Subsequent practice under article 31, paragraph 3 (b), may consist of any "conduct". The word "conduct" is used in the sense of article 2 of the Commission's articles on the responsibility of States for internationally wrongful acts.[96] It may thus include not only acts, but also omissions, including relevant silence, which contribute to establishing agreement.[97] The question under which circumstances omissions, or silence, can contribute to an agreement of all the parties regarding the interpretation of a treaty is addressed in draft conclusion 10, paragraph 2.

(18) Subsequent practice under article 31, paragraph 3 (b), must be conduct "in the application of the treaty". This includes not only official acts at the international or at the internal level that serve to apply the treaty, including to respect or to ensure the fulfilment of treaty obligations, but also, *inter alia*, official statements regarding its interpretation, such as statements at a diplomatic conference, statements in the course of a legal dispute, or judgments of domestic courts; official communications to which the treaty gives rise; or the enactment of domestic legislation or the conclusion of international agreements for the purpose of implementing a treaty even before any specific act of application takes place at the internal or at the international level.

(19) It may be recalled that, in one case, a NAFTA Panel denied that internal legislation can be used as an interpretative aid:

> "Finally, in light of the fact that both Parties have made references to their national legislation on land transportation, the Panel deems it appropriate to refer to article 27 of the Vienna Convention, which states that 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.' This provision directs the Panel not to examine national laws but the applicable international law. Thus, neither the internal law of the United States nor the Mexican law should be utilized for the interpretation of NAFTA. To do so would be to apply an inappropriate legal framework."[98]

Whereas article 27 of the 1969 Vienna Convention is certainly valid and important, this rule does not signify that national legislation may not be taken into account as an element of subsequent practice in the application of the treaty. There is a difference between invoking internal law as a justification for a failure to perform a treaty, on the one hand, and referring to internal law for the purpose of interpreting a provision of a treaty law, on the other. Accordingly, international adjudicatory bodies, in particular the WTO Appellate Body and the European Court of Human Rights, have recognized and regularly distinguished between internal legislation (and other implementing measures at the internal level) that violates treaty obligations, and national legislation or other measures that can serve as a means to interpret the treaty.[99] It should be noted, however, that an element of good faith is implied in any "subsequent practice in the application of the treaty". A manifest misapplication of a treaty, as opposed to a *bona fide* application (even if erroneous), is therefore not an "application of the treaty" in the sense of articles 31 and 32.

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[95] On the distinction between the two forms of subsequent practice see below, paras. (23) and (24) of the present commentary.

[96] *Yearbook ... 2001*, vol. II (Part Two) and Corrigendum, pp. 34–35, paras. (2)–(4) of the commentary.

[97] Waldock, third report on the law of treaties, *Yearbook ... 1964*, vol. II, document A/CN.4/167 and Add.1-3, pp. 61–62, paras. (32)–(33); *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 6, at p. 23; *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392, at p. 410, para. 39; *Dispute between Argentina and Chile concerning the Beagle Channel*, UNRIAA, vol. XXI (Sales No. E/F.95.V2), pp. 53–264, at pp. 185–187, paras. 168–169.

[98] NAFTA Arbitral Panel Final Report, *Cross-Border Trucking Services (Mexico v. United States of America)*, No. USA-MEX-98-2008-01, adopted 6 February 2001, para. 224 (footnotes omitted).

(20) The requirement that subsequent practice in the application of a treaty under article 31, paragraph 3 (b), must be "regarding its interpretation" has the same meaning as the parallel requirement under article 31, paragraph 3 (a) (see paragraphs (13) and (14) above). It may often be difficult to distinguish between subsequent practice that implies a contribution to the interpretation of a treaty and other practice "in the application of the treaty".

(21) The question under which circumstances an "agreement of the parties regarding the interpretation of a treaty" is actually "established" is addressed in draft conclusion 10.

(22) Article 31, paragraph 3 (b), does not explicitly require that the practice must be the conduct of the parties to the treaty themselves. It is, however, the parties themselves, acting through their organs,[100] or by way of conduct in the application of the treaty, who engage in practice that may establish their agreement. The question of whether other actors can generate relevant subsequent practice is addressed in draft conclusion 5.[101]

Paragraph 3 — subsequent practice under article 32

(23) Paragraph 3 of draft conclusion 4 addresses subsequent practice under article 32, that is subsequent practice other than that referred to in article 31, paragraph 3 (b). This paragraph concerns "subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32", as mentioned in paragraph 4 of draft conclusion 2 [1]. This form of subsequent practice, which does not require the agreement of all the parties, was originally referred to in the commentary of the Commission as follows:

> "But, in general, the practice of an individual party or of only some parties as an element of interpretation is on a quite different plane from a concordant practice embracing all the parties and showing their common understanding of the meaning of the treaty. Subsequent practice of the latter kind evidences the agreement of the parties as to the interpretation of the treaty and is analogous to an interpretative agreement. For this reason the Commission considered that subsequent practice establishing the common understanding of all the parties regarding the interpretation of a treaty should be included in paragraph 3 [of what became article 31, paragraph 3, of the 1969 Vienna Convention] as an authentic means of interpretation alongside interpretative agreements. The practice of individual States in the application of a treaty, on the other hand, may be taken into account only as one of the 'further' means of interpretation mentioned in article 70 [which became article 32]."[102]

(24) Paragraph 3 of draft conclusion 4 does not enunciate a requirement, as it is contained in article 31, paragraph 3 (b), that the relevant practice be "regarding the interpretation" of the treaty. Thus, for the purposes of the third paragraph, any practice in the application of

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[99] For example, WTO Panel Report, *United States — Section 110(5) Copyright Act*, WT/DS160/R, adopted 27 July 2000, para. 6.55; WTO Panel Report, *United States — Continued Existence and Application of Zeroing Methodology*, WT/DS350/R, adopted 19 February 2009, para. 7.173; WTO Appellate Body Report, *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011, paras. 335–336; *CMS Gas Transmission Company v. Argentine Republic* (United States/Argentina Bilateral Investment Treaty), Decision on Objections to Jurisdiction, 17 July 2003, ICSID Case No. ARB/01/8, *ICSID Reports 2003*, vol. 7, p. 492, para. 47; *V. v. the United Kingdom* [GC], no. 24888/94, 16 December 1999, ECHR 1999-IX, para. 73; *Kart v. Turkey* [GC], no. 8917/05, 3 December 2009, ECHR 2009-VI, para. 54; *Sigurður A. Sigurjónsson v. Iceland*, no. 16130/90, 30 June 1993, ECHR Series A no. 264, para. 35.

[100] Karl, *Vertrag und spätere Praxis* ... (see footnote 62 above), pp. 115 *et seq*.

[101] See draft conclusion 5, para. 2.

[102] *Yearbook ... 1964*, vol. II, document A/5809, p. 204, para. (13); see also *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 221–222, para. (15).

the treaty that may provide indications as to how the treaty is to be interpreted may be a relevant supplementary means of interpretation under article 32.

(25) This subsequent practice under article 32 has since the adoption of the 1969 Vienna Convention been recognized and applied by international courts and other adjudicatory bodies as a means of interpretation (see paragraphs (26) to (34) below). It should be noted, however, that the WTO Appellate Body, in *Japan — Alcoholic Beverages II*,[103] has formulated a definition of subsequent practice for the purpose of treaty interpretation that seems to suggest that only such "subsequent practice in the application of the treaty" "which establishes the agreement of the parties regarding its interpretation" can at all be relevant for the purpose of treaty interpretation and not any other form of subsequent practice by one or more parties:

> "… subsequent practice in interpreting a treaty has been recognized as a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties regarding its interpretation."[104]

However, the jurisprudence of the International Court of Justice and other international courts and tribunals, and ultimately even that of the WTO Dispute Settlement Body itself (see paragraphs (33) and (34) below), demonstrate that subsequent practice which fulfils all the conditions of article 31, paragraphs 3 (b), of the 1969 Vienna Convention is not the only form of subsequent practice by parties in the application of a treaty that may be relevant for the purpose of treaty interpretation.

(26) In the case of *Kasikili/Sedudu Island*, for example, the International Court of Justice held that a report by a technical expert that had been commissioned by one of the parties and that had "remained at all times an internal document",[105] while not representing subsequent practice that establishes the agreement of the parties under article 31, paragraph 3 (b), could "nevertheless support the conclusions" that the Court had reached by other means of interpretation.[106]

(27) The ICSID Tribunals have also used subsequent State practice as a means of interpretation in a broader sense.[107] For example, when addressing the question of whether minority shareholders can acquire rights from investment protection treaties and have standing in ICSID procedures, the tribunal in *CMS Gas v. Argentina* held that:

> "State practice further supports the meaning of this changing scenario. … Minority and non-controlling participations have thus been included in the protection granted or have been admitted to claim in their own right. Contemporary practice relating to lump-sum agreements … among other examples, evidence increasing flexibility in the handling of international claims."[108]

(28) The European Court of Human Rights held in *Loizidou v. Turkey* that its interpretation was "confirmed by the subsequent practice of the Contracting Parties",[109] that is "the evidence of a practice denoting practically universal agreement amongst Contracting Parties that [a]rticles 25 and 46 … of the Convention do not permit territorial or substantive

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[103] WTO Appellate Body Report, *Japan — Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, adopted on 1 November 1996, and WTO Report of the Panel, WT/DS8/R, WT/DS10/R and WT/DS11/R, adopted on 1 November 1996.

[104] *Ibid.* (WTO Appellate Body Report), section E, p. 16.

[105] *Kasikili/Sedudu Island* (see footnote 8 above), at p. 1078, para. 55.

[106] *Ibid.*, p. 1096, para. 80.

[107] O.K. Fauchald, "The Legal Reasoning of ICSID Tribunals — An Empirical Analysis", *European Journal of International Law*, vol. 19, No. 2 (2008), p. 301, at p. 345.

[108] *CMS Gas Transmission Company v. Argentine Republic* (United States/Argentina Bilateral Investment Treaty), Decision on Objections to Jurisdiction, 17 July 2003, ICSID Case No. ARB/01/8, *ICSID Reports 2003*, vol. 7, p. 492, at para. 47.

[109] *Loizidou v. Turkey* (preliminary objections), no. 15318/89, 23 March 1995, ECHR Series A no. 310, para. 79.

restrictions".[110] More often the European Court of Human Rights has relied on — not necessarily uniform — subsequent practice of the parties by referring to national legislation and domestic administrative practice, as a means of interpretation. In the case of *Demir and Baykara v. Turkey*, for example, the Court held that "[a]s to the practice of European States, it can be observed that, in the vast majority of them, the right for public servants to bargain collectively with the authorities has been recognised"[111] and that "[t]he remaining exceptions can be justified only by particular circumstances".[112]

(29) The Inter-American Court of Human Rights, when taking subsequent practice of the parties into account, has also not limited its use to cases in which the practice established the agreement of the parties. Thus, in the case of *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* the Inter-American Court of Human Rights held that the mandatory imposition of the death penalty for every form of conduct that resulted in the death of another person was incompatible with article 4, paragraph 2, of the American Convention on Human Rights (imposition of the death penalty only for the most serious crimes). In order to support this interpretation, the Court held that it was "useful to consider some examples in this respect, taken from the legislation of those American countries that maintain the death penalty".[113]

(30) The Human Rights Committee under the International Covenant on Civil and Political Rights is open to arguments based on subsequent practice in a broad sense (under article 32 of the 1969 Vienna Convention) when it comes to the justification of interferences with the rights set forth in the Covenant.[114] Interpreting the rather general terms contained in article 19, paragraph 3, of the Covenant (permissible restrictions on the freedom of expression), the Committee observed that "similar restrictions can be found in many jurisdictions",[115] and concluded that the aim pursued by the contested law did not, as such, fall outside the legitimate aims of article 19, paragraph 3, of the Covenant.[116]

(31) ITLOS has on some occasions referred to the subsequent practice of the parties without verifying whether such practice actually established an agreement between all the parties regarding the interpretation of the treaty. In the *M/V "SAIGA" (No. 2)* case,[117] for example, the Tribunal reviewed State practice with regard to the use of force to stop a ship according to the United Nations Convention on the Law of the Sea.[118] Relying on the "normal practice used to stop a ship", the Tribunal did not specify the respective State practice but rather assumed a certain general standard to exist.[119]

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[110] *Ibid.*, para. 80; it is noteworthy that the Court described "such a State practice" as being "uniform and consistent" despite the fact that it had recognised that two States possibly constituted exceptions (Cyprus and the United Kingdom; "whatever their meaning"), paras. 80 and 82.

[111] *Demir and Baykara v. Turkey* [GC], no. 34503/97, 12 November 2008, ECHR-2008, para. 52.

[112] *Ibid.*, para. 151; similarly *Jorgic v. Germany*, no. 74613/01, 12 July 2007, ECHR 2007-III, para. 69.

[113] *Hilaire, Constantine and Benjamin et al.* (see footnote 13 above), Concurring Separate Opinion of Judge Sergio García Ramírez, para. 12; *Case of Artavia Murillo et al. ("*In vitro *fertilization") v. Costa Rica*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 28 November 2012, Inter-Am. Ct. H.R. Series C No. 257, paras. 245–256.

[114] *Jong-Cheol v. The Republic of Korea*, Views, 27 July 2005, Communication No. 968/2001, Report of the Human Rights Committee, *Official Records of the General Assembly, Sixtieth Session, Supplement No. 40* (A/60/40), vol. II, annex V, G.

[115] *Ibid.*, para. 8.3.

[116] *Ibid.*; see also *Yoon and Choi v. The Republic of Korea*, Views, 3 November 2006, Communication Nos. 1321/2004 and 1322/2004, *ibid., Sixty-second Session, Supplement No. 40* (A/62/40), vol. II, annex VII, V, para. 8.4.

[117] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999*, p. 10, at pp. 61–62, paras. 155–156.

[118] United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3, art. 293.

[119] *M/V "SAIGA" (No. 2)* (see footnote 117 above), at paras. 155–156; see also *"Tomimaru" (Japan v. Russian Federation)*, case No. 15, Prompt Release, Judgment, *ITLOS Reports 2007*, p. 74, para. 72; *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order of 27 August 1999, *ITLOS Reports 1999*, p. 280, at paras. 45 and 50.

(32) The International Criminal Tribunal for the former Yugoslavia, referring to the Convention on the Prevention and Punishment of the Crime of Genocide,[120] noted in the *Jelisić* judgment that:

> "… the Trial Chamber … interprets the Convention's terms in accordance with the general rules of interpretation of treaties set out in articles 31 and 32 of the Vienna Convention on the Law of Treaties. … The Trial Chamber also took account of subsequent practice grounded upon the Convention. Special significance was attached to the Judgments rendered by the Tribunal for Rwanda. … The practice of States, notably through their national courts, and the work of international authorities in this field have also been taken into account."[121]

(33) The WTO dispute settlement bodies also occasionally distinguish between "subsequent practice" that satisfies the conditions of article 31, paragraph (b), and other forms of subsequent practice in the application of the treaty that they also recognize as being relevant for the purpose of treaty interpretation. In *US — Section 110(5) Copyright Act*[122] (not appealed), for example, the Panel had to determine whether a "minor exceptions doctrine" concerning royalty payments applied.[123] The Panel found evidence in support of the existence of such a doctrine in several member States' national legislation and noted:

> "… we recall that [a]rticle 31 (3) of the Vienna Convention provides that together with the context (a) any subsequent agreement, (b) subsequent practice, or (c) any relevant rules of international law applicable between the parties, shall be taken into account for the purposes of interpretation. We note that the parties and third parties have brought to our attention several examples from various countries of limitations in national laws based on the minor exceptions doctrine. In our view, [S]tate practice as reflected in the national copyright laws of Berne Union members before and after 1948, 1967 and 1971, as well as of WTO Members before and after the date that the TRIPS Agreement became applicable to them, confirms our conclusion about the minor exceptions doctrine."[124]

And the Panel added the following cautionary footnote:

> "By enunciating these examples of [S]tate practice we do not wish to express a view on whether these are sufficient to constitute 'subsequent practice' within the meaning of [a]rticle 31 (3) (b) of the Vienna Convention."[125]

(34) In *European Communities — Customs Classification of Certain Computer Equipment*, the WTO Appellate Body criticized the Panel for not having considered decisions by the Harmonized System Committee of the World Customs Organization (WCO) as a relevant subsequent practice:

> "A proper interpretation also would have included an examination of the existence and relevance of subsequent practice. We note that the United States referred, before the Panel, to the decisions taken by the Harmonized System Committee of the WCO in April 1997 on the classification of certain LAN equipment as ADP machines. Singapore, a third party in the panel proceedings, also referred to these decisions. The European Communities observed that it had introduced reservations with regard

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[120] United Nations, *Treaty Series*, vol. 78, No. 1021, p. 277.

[121] *Prosecutor v. Goran Jelisić*, Trial Chamber, Judgment, 14 December 1999, IT-95-10-T, para. 61 (footnotes omitted); similarly *Prosecutor v. Radislav Krstić*, Trial Chamber, Judgment, 2 August 2001, IT-98-33-T, para. 541.

[122] WTO Panel Report, *United States — Section 110(5) of the US Copyright Act*, WT/DS160/R, adopted 27 July 2000.

[123] See Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 9, para. 1.

[124] WTO Panel Report, *United States — Section 110(5) of the US Copyright Act*, WT/DS160/R, adopted 27 July 2000, para. 6.55 (footnotes omitted).

[125] *Ibid.*, footnote 69.

> to these decisions. … However, we consider that in interpreting the tariff concessions in Schedule LXXX, decisions of the WCO may be relevant … ."[126]

Thus, on closer inspection, the WTO dispute settlement bodies also recognize the distinction between "subsequent practice" under article 31, paragraph 3 (b), and a broader concept of subsequent practice (under article 32) that does not presuppose an agreement between all the parties of the treaty.[127]

(35) In using subsequent practice by one or more, but not all, parties to a treaty as a supplementary means of interpretation under article 32 one must, however, always remain conscious of the fact that "the view of one State does not make international law".[128] In any case, the distinction between agreed subsequent practice under article 31, paragraph 3 (b), as an authentic means of interpretation, and other subsequent practice (in a broad sense) under article 32, implies that a greater interpretative value should be attributed to the former. Domestic courts have sometimes not clearly distinguished between subsequent agreements and subsequent practice under article 31, paragraph 3, and other subsequent practice under article 32.[129]

(36) The distinction between subsequent practice under article 31, paragraph 3 (b), and subsequent practice under article 32 also contributes to answering the question of whether subsequent practice requires repeated action with some frequency[130] or whether a one-time application of the treaty may be enough.[131] In the WTO framework, the Appellate Body has found:

> "An isolated act is generally not sufficient to establish subsequent practice; it is a sequence of acts establishing the agreement of the parties that is relevant."[132]

If, however, the concept of subsequent practice as a means of treaty interpretation is distinguished from a possible agreement between the parties, frequency is not a necessary element of the definition of the concept of "subsequent practice" in the broad sense (under article 32).[133]

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[126] See WTO Appellate Body Report, *EC — Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R and WT/DS68/AB/R, adopted 22 June 1998, at para. 90. See also I. van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford, Oxford University Press, 2009), p. 342.

[127] See also WTO Appellate Body Report, *US — COOL*, WT/DS384/AB/R and WT/DS386/AB/R, adopted 23 July 2012, para. 452.

[128] *Sempra Energy International v. Argentine Republic*, Award, 28 September 2007, ICSID Case No. ARB/02/16, para. 385; see also *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, Award, 22 May 2007, ICSID Case No. ARB/01/3, para. 337; WTO Panel Report, *US — Large Civil Aircraft (2nd Complaint)*, WT/DS353/R, adopted 23 March 2012, fn. 2420 in para. 7.953; *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 28 June 2016, para. 476.

[129] See, for example: United Kingdom, House of Lords, *Deep Vein Thrombosis and Air Travel Group Litigation* [2005] UKHL 72, paras. 54–55 and 66–85 (Lord Mance); United Kingdom, House of Lords, *R (Al-Jedda) v. Secretary of State for Defence* [2007] UKHL 58, para. 38; United Kingdom, House of Lords, *R (Mullen) v. Secretary of State for the Home Department* [2004] UKHL 18, para. 47 (Lord Steyn); United Kingdom, House of Lords, *King v. Bristow Helicopters Ltd. (Scotland)* [2002] UKHL 7, para. 80 (Lord Hope); New Zealand, Court of Appeal, *Zaoui v. Attorney-General (No. 2)* [2005] 1 NZLR 690, para. 130 (Glazebrook J.); New Zealand, Court of Appeal, *P. v. Secretary for Justice, ex parte A.P.* [2004] 2 NZLR 28, para. 61 (Glazebrook J.); Germany, Federal Administrative Court, BVerwGE, vol. 104, p. 254, at pp. 256–257; judgment of 29 November 1988, 1 C 75/86 [1988], *Neue Zeitschrift für Verwaltungsrecht*, 1989, p. 765, at p. 766.

[130] Villiger, *Commentary* ... (see footnote 23 above), p. 431, para. 22.

[131] Linderfalk, *On the Interpretation of Treaties* (see footnote 54 above), p. 166.

[132] WTO Appellate Body Report, *Japan — Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, adopted 1 November 1996, section E, p. 13.

[133] See para. (11) of the commentary to draft conclusion 9, paragraph 2, above; Kolb, *Interprétation et création du droit international* (Brussels, Bruylant, 2006), pp. 506-507.

(37) Thus, "subsequent practice" in the broad sense (under article 32) covers any application of the treaty by one or more (but not all) parties. It can take various forms.[134] Such "conduct by one or more parties in the application of the treaty" may, in particular, consist of a direct application of the treaty in question, conduct that is attributable to a State party as an application of the treaty, a statement or a judicial pronouncement regarding its interpretation or application. Such conduct may include official statements concerning the treaty's meaning, protests against non-performance or tacit acceptance of statements or acts by other parties.[135]

Conclusion 5
Conduct as subsequent practice

1. Subsequent practice under articles 31 and 32 may consist of any conduct of a party in the application of a treaty, whether in the exercise of its executive, legislative, judicial, or other functions.

2. Other conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty.

Commentary

(1) Draft conclusion 5 addresses the question of possible authors of subsequent practice under articles 31 and 32 of the 1969 Vienna Convention. The phrase "under articles 31 and 32" makes it clear that this draft conclusion applies both to subsequent practice as an authentic means of interpretation under article 31, paragraph 3 (b), and to subsequent practice as a supplementary means of interpretation under article 32. Paragraph 1 of draft conclusion 5 defines positively whose conduct in the application of the treaty may constitute subsequent practice under articles 31 and 32, whereas paragraph 2 states negatively which conduct does not, but which may nevertheless be relevant when assessing the subsequent practice of parties to a treaty. Since the draft conclusions do not deal specifically with treaties between States and international organizations or between international organizations, the practice of international organizations is addressed only to a limited extent in draft conclusion 12, paragraph 3, but not in draft conclusion 5.[136]

Paragraph 1 — conduct constituting subsequent practice

(2) Paragraph 1 of draft conclusion 5, by using the phrase "any conduct of a party", borrows language from article 2 (a) of the articles on responsibility of States for internationally wrongful acts.[137] Accordingly, the term "any conduct" encompasses actions and omissions. It is not limited to conduct of the organs of a State, but may also cover conduct of private actors acting under delegated public authority. The expression "whether in the exercise of its executive, legislative, judicial, or other functions" focuses on the functions of a State, rather than on its organs.[138] The relevant conduct must be "in the application of a treaty".[139] The borrowing of language from the articles on responsibility of States for internationally wrongful acts does not, however, extend to the concept of attribution and to the requirement that the conduct in question be "internationally wrongful".

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[134] Aust, *Modern Treaty Law and Practice*, 3rd edition (Cambridge, United Kingdom, Cambridge University Press, 2013), p. 239.

[135] Karl, *Vertrag und spätere Praxis* ... (see footnote 62 above), pp. 114 *et seq.*

[136] See para. (3) of the commentary to draft conclusion 1 above.

[137] Articles on the responsibility of States for internationally wrongful acts, with commentaries, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 35, para. (4) of the commentary; the question of the attribution of relevant subsequent conduct to international organizations for the purpose of treaty interpretation is addressed in draft conclusion 12 below.

[138] *Cf.* arts. 4 and 5 of the articles on responsibility of States for internationally wrongful acts, General Assembly resolution 56/83 of 12 December 2001, annex. For the draft articles adopted by the Commission and the commentaries thereto, see *Yearbook ... 2001*, vol. II (Part Two) and Corrigendum, paras. 76–77.

[139] See para. (18) of the commentary to draft conclusion 4 above.

Since the concept of "application of the treaty" requires conduct in good faith, a manifest misapplication of a treaty falls outside this scope.[140]

(3) An example of relevant conduct that does not directly arise from the conduct of the parties, but nevertheless constitutes an example of State practice, has been identified by the International Court of Justice in the *Kasikili/Sedudu Island* case. There the Court considered that the regular use of an island on the border between Namibia (former South-West Africa) and Botswana (former Bechuanaland) by members of a local tribe, the Masubia, could be regarded as subsequent practice in the sense of article 31, paragraph 3 (b), of the Vienna Convention if it:

> "... was linked to a belief on the part of the Caprivi authorities that the boundary laid down by the 1890 Treaty followed the southern channel of the Chobe; and, second, that the Bechuanaland authorities were fully aware of and accepted this as a confirmation of the Treaty boundary."[141]

(4) By referring to any conduct of a party in the application of the treaty, however, paragraph 1 does not imply that any such conduct necessarily constitutes, in a given case, subsequent practice for the purpose of treaty interpretation. The use of the phrase "may consist" is intended to reflect this point. This clarification is particularly important in relation to conduct of State organs that might contradict an officially expressed position of the State with respect to a particular matter and thus contribute to an equivocal conduct by the State.

(5) Given the significant differences in the internal organization of States, it is difficult to determine the conditions under which the conduct of lower State organs is relevant subsequent practice for purposes of treaty interpretation. The relevant criterion is less the position of the organ in the hierarchy of the State than its function in interpreting and applying any particular treaty.

(6) Subsequent practice of States in the application of a treaty may certainly be performed by the high-ranking government officials mentioned in article 7 of the 1969 Vienna Convention. Yet, since most treaties typically are not applied by such high officials, international courts and tribunals have recognized that the conduct of lower authorities may also, under certain conditions, constitute relevant subsequent practice in the application of a treaty. Accordingly, the International Court of Justice recognized in the *Case concerning rights of nationals of the United States in Morocco* that article 95 of the General Act of the International Conference of Algeciras (1906)[142] had to be interpreted flexibly in light of the inconsistent practice of local customs authorities.[143] The jurisprudence of arbitral tribunals confirms that relevant subsequent practice may emanate from lower officials. In the *German External Debts* decision, the Arbitral Tribunal considered a letter of the Bank of England to the German Federal Debt Administration as relevant subsequent practice.[144] And in the case of *Tax regime governing pensions paid to retired UNESCO officials residing in France*, the Arbitral Tribunal accepted, in principle, the practice of the French tax administration of not collecting taxes on the pensions of retired UNESCO employees as being relevant subsequent practice. Ultimately, however, the Arbitral Tribunal considered

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[140] See para. (19) of the commentary to draft conclusion 4 above.

[141] *Kasikili/Sedudu Island* (see footnote 8 above), p. 1094, para. 74.

[142] 34 Stat. 2905 (1902–1907).

[143] *Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952, I.C.J. Reports 1952*, p. 176, at p. 211.

[144] *Case concerning the question whether the re-evaluation of the German Mark in 1961 and 1969 constitutes a case for application of the clause in article 2 (e) of Annex I A of the 1953 Agreement on German External Debts between Belgium, France, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States of America on the one hand and the Federal Republic of Germany on the other*, Decision, 16 May 1980, UNRIAA, vol. XIX (Sales No. E/F.90.V.7), pp. 67–145, at pp. 103–104, para. 31.

some contrary official pronouncements by a higher authority, the French Government, to be decisive.[145]

(7) The practice of lower and local officials may thus be subsequent practice "of a party in the application of a treaty" if this practice is sufficiently unequivocal and if the Government can be expected to be aware of this practice and has not contradicted it within a reasonable time.[146]

Paragraph 2 — conduct not constituting subsequent practice

(8) Paragraph 2 of draft conclusion 5 comprises two sentences. The first sentence indicates that conduct other than that envisaged in paragraph 1, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. The phrase "other conduct" was introduced in order clearly to establish the distinction between the conduct contemplated in paragraph 2 and that contemplated in paragraph 1. At the same time, conduct not covered by paragraph 1 may be relevant when "assessing" the subsequent practice of parties to a treaty.[147]

(9) "Subsequent practice in the application of a treaty" will be brought about by those who are called to apply the treaty, which are normally the States parties themselves. The general rule has been formulated by the Iran-U.S. Claims Tribunal as follows:

> "It is a recognized principle of treaty interpretation to take into account, together with the context, any subsequent practice in the application of an international treaty. This practice must, however, be a practice of the parties to the treaty and one which establishes the agreement of the parties regarding the interpretation of that treaty.
>
> "Whereas one of the participants in the settlement negotiations, namely Bank Markazi, is an entity of Iran and thus its practice can be attributed to Iran as one of the parties to the Algiers Declarations, the other participants in the settlement negotiations and in actual settlements, namely the United States banks, are not entities of the Government of the United States, and their practice cannot be attributed as such to the United States as the other party to the Algiers Declarations."[148]

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[145] *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France*, Decision, 14 January 2003, UNRIAA, vol. XXV (Sales No. E/F.05.V.5), pp. 231–266, at p. 257, para. 66 and p. 259, para. 74.

[146] See Chanaki, *L'adaptation des traités* ... (see footnote 48 above), pp. 323–328; Gardiner, *Treaty Interpretation* (footnote 5 above), p. 269–270; M. Kamto, "La volonté de l'État en droit international", *Recueil des cours ... 2004*, vol. 310, pp. 9–428, at pp. 142–144; Dörr, "Article 31 ..." (see footnote 47 above), p. 597, para. 79.

[147] The Commission has adopted the same approach in draft conclusion 4, paragraph 3, on identification of customary international law. According to this draft conclusion: "[c]onduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2."

[148] See Iran-United States Claims Tribunal, *United States of America et al. v. Islamic Republic of Iran et al.*, Award No. 108-A-16/582/591-FT, *Iran-United States Claims Tribunal Reports*, vol. 5 (1984), p. 57, at p. 71; similarly Iran-United States Claims Tribunal, Interlocutory Award No. ITL 83-B1-FT (Counterclaim), *The Islamic Republic of Iran v. United States of America*, *ibid.*, vol. 38 (2004-2009), p. 77, at pp. 124–125, paras. 127–128; see also Iran-United States Claims Tribunal, Interlocutory Award No. ITL 37-111-FT, *International Schools Services, Inc. (ISS) v. National Iranian Copper Industries Company (NICICO)*, *ibid.*, vol. 5 (1984), p. 338, Dissenting Opinion of President Lagergren, p. 348, at p. 353: "… the provision in the Vienna Convention on subsequent agreements refers to agreements between States parties to a treaty, and a settlement agreement between two arbitrating parties can hardly be regarded as equal to an agreement between the two States that are parties to the treaty, even though the Islamic Republic of Iran was one of the arbitrating parties in the case". For the Algiers Declarations (Declaration of the Government of the Democratic and Popular Republic of Algeria and Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, see *International Legal Materials*, vol. 20, No. 1 (1981), pp. 224 and 230 (respectively), at pp. 232–233).

(10) The first sentence of the second paragraph of draft conclusion 5 is intended to reflect this general rule. It emphasizes the primary role of the States parties to a treaty who are the masters of the treaty and are ultimately responsible for its application. This does not exclude that conduct by non-State actors may constitute a form of application of the treaty if it amounts to an exercise of executive or other functions of a State party, for example acting through private entities, whether State-owned or not, or authorizing them to exercise governmental authority with respect to the implementation of a treaty.

(11) "Other conduct" in the sense of paragraph 2 of draft conclusion 5 may be that of different actors. Such conduct may, in particular, be practice of parties that is not "in the application of the treaty" or statements by a State that is not party to a treaty about the latter's interpretation,[149] or a pronouncement by an independent treaty monitoring body in relation to the interpretation of the treaty concerned,[150] or acts of technical bodies that are tasked by Conferences of States Parties to advise on the implementation of treaty provisions, or different forms of conduct or statements of non-State actors.

(12) The phrase "assessing the subsequent practice" in the second sentence of paragraph 2 should be understood in a broad sense as covering both the identification of the existence of a subsequent practice and the determination of its legal significance. Statements or conduct of other actors, such as other States, international organizations or non-State actors, can reflect, or initiate, relevant subsequent practice of the parties to a treaty.[151] Such reflection or initiation of subsequent practice of the parties by the conduct of other actors should not, however, be conflated with the practice by the parties to the treaty themselves. Activities of actors that are not parties to a treaty may only contribute to assessing subsequent practice of the States parties to a treaty.

(13) Decisions, resolutions and other practice by international organizations can be relevant for the interpretation of treaties in their own right. This is recognized, for example, in article 2 (j) of the 1986 Vienna Convention, which mentions the "established practice of the organization" as one form of the "rules of the organization".[152] Draft conclusion 5 only concerns the question of whether the practice of international organizations may be indicative of relevant practice by States parties to a treaty. The practice of international organizations in the application of their constituent instruments is addressed in draft conclusion 12, paragraph 3.

(14) Reports by international organizations at the universal level, which are prepared on the basis of a mandate to provide accounts on State practice in a particular field, may enjoy authority in the assessment of such practice. For example, the *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* of the Office of the United Nations High Commissioner for Refugees (hereinafter "UNHCR Handbook") is an important work that reflects and thus provides guidance for State practice.[153] The same is true for the so-

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[149] See, for example, *Observations of the United States of America on the Human Rights Committee's General Comment 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, 22 December 2008*, p. 1, para. 3 (available at: www.state.gov/documents/organization/138852.pdf). To the extent that the statement by the United States relates to the interpretation of the Optional Protocol to the International Covenant on Civil and Political Rights (United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171), to which the United States is not party nor a contracting State, its statement constitutes "other conduct" under draft conclusion 5, para. 2.

[150] See, for example, International Law Association, Committee on International Human Rights Law and Practice, "Final report on the impact of findings of United Nations Human Rights treaty bodies", *Report of the Seventy-first Conference, Berlin, 16–21 August 2004* (London, 2004), p. 621, paras. 21 *et seq*.

[151] See Gardiner, *Treaty Interpretation* (see footnote 5 above), p. 270.

[152] See paras. (40)–(42) of the commentary to draft conclusion 12 below.

[153] See UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (December 2011), HCR/1P/4/ENG/REV. 3 (http://www.refworld.org/docid/4f33c8d92.html), Foreword; the view that the UNHCR Handbook itself expresses State practice has correctly been rejected by the Federal Court of Australia in *Semunigus v. Minister for Immigration and Multicultural Affairs* [1999] FCA

called 1540 Matrix, which is a systematic compilation by the United Nations Security Council Committee established pursuant to resolution 1540 (2004) of 24 April 2004 on implementation measures taken by Member States.[154] As far as the Matrix relates to the implementation of the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological and Toxin Weapons and on their Destruction,[155] as well as to the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction,[156] it constitutes evidence for and an assessment of subsequent State practice to those treaties.[157]

(15) Other non-State actors may also play a role in assessing subsequent practice of the parties in the application of a treaty. A pertinent example is the International Committee of the Red Cross (ICRC).[158] Apart from fulfilling a general mandate conferred on it by the Geneva Conventions for the protection of war victims and by the Statutes of the International Red Cross and Red Crescent Movement,[159] ICRC occasionally provides interpretative guidance on the 1949 Geneva Conventions[160] and the Additional Protocols[161] on the basis of a mandate from the Statutes of the Movement.[162] Article 5, paragraph 2 (g), of the Statutes provides:

> "The role of the International Committee, in accordance with its [s]tatutes, is in particular: … (g) to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof."

On the basis of this mandate, ICRC, for example, published in 2009 an *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*.[163] The Interpretative Guidance is the outcome of an "expert process"

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422 (1999), Judgment, 14 April 1999, paras. 5–13; the UNHCR Handbook nevertheless possesses considerable evidentiary weight as a correct statement of subsequent State practice. Its authority is based on article 35, paragraph 1, of the Convention Relating to the Status of Refugees, 1951 (United Nations, *Treaty Series*, vol. 189, No. 2545, p. 137), according to which "[t]he Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for refugees … in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention".

[154] Security Council resolution 1540 (2004) of 24 April 2004, operative para. 8 (c); according to the 1540 Committee's website, "the 1540 Matrix has functioned as the primary method used by the 1540 Committee to organize information about implementation of UN Security Council resolution 1540 by Member States" (http://www.un.org/en/sc/1540/national-implementation/matrices.shtml (accessed 11 May 2016)).

[155] United Nations, *Treaty Series*, vol. 1015, No. 14860, p. 163.

[156] United Nations, *Treaty Series*, vol. 1974, No. 33757, p. 45.

[157] See, generally, Gardiner, *Treaty Interpretation* (footnote 5 above), p. 270.

[158] H.-P. Gasser, "International Committee of the Red Cross (ICRC)", *Max Planck Encyclopedia of Public International Law* (www.mpepil.com), para. 20.

[159] *Ibid.*, para. 25.

[160] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva, 12 August 1949), United Nations, *Treaty Series*, vol. 75, No. 970, p. 31 ("Geneva Convention I"); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva, 12 August 1949), *ibid.*, No. 971, p. 85 ("Geneva Convention II"); Geneva Convention relative to the Treatment of Prisoners of War (Geneva, 12 August 1949), *ibid.*, No. 972, p. 135 ("Geneva Convention III"); and Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949), *ibid.*, No. 973, p. 287 ("Geneva Convention IV").

[161] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, United Nations, *Treaty Series*, vol. 1125, No. 17512, p. 3; and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977, *ibid.*, No. 17513, p. 609.

[162] Adopted by the 25th International Conference of the Red Cross at Geneva in 1986 and amended in 1995 and 2006. Available from www.icrc.org/eng/assets/files/other/statutes-en-a5.pdf (accessed on 17 May 2016).

[163] Geneva, 2009, p. 10. Available from www.icrc.org.

based on an analysis of State treaty and customary practice and it "reflect[s] the ICRC's institutional position as to how existing [international humanitarian law] should be interpreted".[164] In this context it is, however, important to note that States have reaffirmed their primary role in the development of international humanitarian law. Resolution 1 of the 31st International Conference of the Red Cross and Red Crescent (2011), while recalling "the important roles of the [ICRC]", "emphasiz[es] the primary role of States in the development of international humanitarian law".[165]

(16) Another example of conduct of non-State actors that may be relevant for assessing the subsequent practice of States parties is the Monitor, a joint initiative of the International Campaign to Ban Landmines and the Cluster Munitions Coalition. The Monitor acts as a *de facto* monitoring regime[166] for the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Ottawa Convention)[167] and the 2008 Convention on Cluster Munitions (Dublin Convention).[168] The Monitor lists pertinent statements and practice by States parties and signatories and identifies, *inter alia*, interpretative questions concerning the Dublin Convention.[169]

(17) The examples of ICRC and the Monitor show that non-State actors can provide valuable evidence of subsequent practice of parties, contribute to assessing this evidence and even solicit its coming into being. However, non-State actors can also pursue their own goals, which may be different from those of States parties. Their assessments must thus be critically reviewed.

(18) The text of draft conclusion 5 does not refer to "social practice" as an example of "other conduct … which may be relevant when assessing the subsequent practice of parties to a treaty".[170] The European Court of Human Rights has occasionally considered "increased social acceptance"[171] and "major social changes"[172] to be relevant for the purpose of treaty interpretation. The invocation of "social changes" or "social acceptance" by the Court, however, has ultimately remained linked to the practice of States parties.[173] This is true, in particular, for the leading cases of *Dudgeon v. the United Kingdom*[174] and *Christine Goodwin v. the United Kingdom*.[175] In *Dudgeon v. the United Kingdom*, the Court found that there was an "increased tolerance of homosexual behaviour" by pointing to the fact "that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied" and that it could therefore not "overlook the marked changes which have occurred in this regard in the domestic law of the member States".[176] The Court further pointed to the fact that "in Northern Ireland itself, the authorities have refrained in recent years from enforcing the law".[177] And in *Christine Goodwin v. the United Kingdom*, the Court attached importance "to the clear and uncontested evidence of a continuing international trend in

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[164] *Ibid.*, p. 9.

[165] Resolution 1 on strengthening legal protection for victims of armed conflicts, 1 December 2011.

[166] See www.the-monitor.org.

[167] United Nations, *Treaty Series*, vol. 2056, No. 35597, p. 211.

[168] *Ibid.*, vol. 2688, No. 47713, p. 39.

[169] See, for example, *Cluster Munitions Monitor 2011*, pp. 24–31.

[170] See A/CN.4/660, paras. 129 *et seq*.

[171] *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, 11 July 2002, ECHR 2002-VI, para. 85.

[172] *Ibid.*, para. 100.

[173] See also *I. v. the United Kingdom* [GC], no. 25680/94, 11 July 2002, para. 65; *Burden and Burden v. the United Kingdom*, no. 13378/05, 12 December 2006, para. 57; *Shackell v. the United Kingdom* (dec.), no. 45851/99, 27 April 2000, para. 1; *Schalk and Kopf v. Austria*, no. 30141/04, 24 June 2010, para. 58.

[174] *Dudgeon v. the United Kingdom*, no. 7525/76, 22 October 1981, ECHR Series A No. 45, in particular para. 60.

[175] *Christine Goodwin v. the United Kingdom* [GC] (see footnote 171 above), in particular para. 85.

[176] See *Dudgeon v. the United Kingdom*, no. 7525/76, 22 October 1981, ECHR Series A No. 45, para. 60.

[177] *Ibid.*

favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals".[178]

(19) The European Court of Human Rights thus verifies whether social developments are actually reflected in the practice of States parties. This was true, for example, in cases concerning the status of children born out of wedlock[179] and in cases that concerned the alleged right of certain Roma ("Gypsy") people to have a temporary place of residence assigned by municipalities in order to be able to pursue their itinerant lifestyle.[180]

(20) It can be concluded that mere (subsequent) social practice, as such, is not sufficient to constitute relevant subsequent practice of the parties in the application of a treaty. Social practice has, however, occasionally been recognized by the European Court of Human Rights as contributing to the assessment of State practice.

Part Three
General aspects

Conclusion 6
Identification of subsequent agreements and subsequent practice

1. The identification of subsequent agreements and subsequent practice under article 31, paragraph 3, requires, in particular, a determination whether the parties, by an agreement or a practice, have taken a position regarding the interpretation of the treaty. Such a position is not taken if the parties have merely agreed not to apply the treaty temporarily or agreed to establish a practical arrangement (*modus vivendi*).

2. Subsequent agreements and subsequent practice under article 31, paragraph 3, may take a variety of forms.

3. The identification of subsequent practice under article 32 requires, in particular, a determination whether conduct by one or more parties is in the application of the treaty.

Commentary

(1) The purpose of draft conclusion 6 is to indicate that subsequent agreements and subsequent practice, as means of interpretation, must be identified.

Paragraph 1, first sentence — the term "regarding the interpretation"

(2) The first sentence of paragraph 1 recalls that the identification of subsequent agreements and subsequent practice for the purposes of article 31, paragraph 3 (a) and (b), requires particular consideration of the question of whether the parties, by an agreement or a practice, have taken a position regarding the interpretation of a treaty or whether they were motivated by other considerations.

(3) Subsequent agreements under article 31, paragraph 3 (a), must be "regarding the interpretation of the treaty or the application of its provisions" and subsequent practice under article 31, paragraph 3 (b), must be "in the application of the treaty" and thereby establish an agreement "regarding its interpretation".[181] The relationship between the terms "interpretation" and "application" in article 31, paragraph 3, is not clear-cut. "Interpretation"

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[178] *Christine Goodwin v. the United Kingdom* [GC] (see footnote 171 above), para. 85; see also, *ibid.*, para. 90.

[179] *Mazurek v. France*, no. 34406/97, 1 February 2000, ECHR 2000-II, para. 52; see also *Marckx v. Belgium*, no. 6833/74, 13 June 1979, ECHR Series A no. 31, para. 41; *Inze v. Austria*, no. 8695/79, 28 October 1987, ECHR Series A no. 126, para. 44; *Brauer v. Germany*, no. 3545/04, 28 May 2009, para. 40.

[180] *Chapman v. the United Kingdom* [GC], no. 27238/95, 18 January 2001, ECHR 2001-I, paras. 70 and 93; see also *Lee v. the United Kingdom* [GC], no. 25289/94, 18 January 2001, paras. 95–96; *Beard v. the United Kingdom* [GC], no. 24882/94, 18 January 2001, paras. 104–105; *Coster v. the United Kingdom* [GC], no. 24876/94, 18 January 2001, paras. 107–108; *Jane Smith v. the United Kingdom* [GC], no. 25154/94, 18 January 2001, paras. 100–101.

[181] See above draft conclusion 4, paras. 1–3, and commentary thereto, paras. (17)–(20).

is the process by which the meaning of a treaty, including of one or more of its provisions, is clarified. "Application" encompasses conduct by which the rights under a treaty are exercised or its obligations are complied with, in full or in part. "Interpretation" refers to a mental process, whereas "application" focuses on actual conduct (acts and omissions). In this sense, the two concepts are distinguishable, and may serve different purposes under article 31, paragraph 3 (see paragraphs (4) to (6) below) but they are also closely interrelated and build upon each other.

(4) Whereas there may be aspects of "interpretation" that remain unrelated to the "application" of a treaty,[182] application of a treaty almost inevitably involves some element of interpretation — even in cases in which the rule in question appears to be clear on face value.[183] Therefore, an agreement or conduct "regarding the interpretation" of the treaty and an agreement or conduct "in the application" of the treaty both imply that the parties assume a position regarding the interpretation of the treaty.[184] Whereas in the case of a "subsequent agreement between the parties regarding the interpretation of the treaty" under article 31, paragraph 3 (a) (first alternative), the position regarding the interpretation of a treaty is specifically and purposefully assumed by the parties, this may be less clearly identifiable in the case of a "subsequent agreement … regarding … the application of its provisions" under article 31, paragraph 3 (a) (second alternative).[185] Assuming a position regarding interpretation "by application" is also implied in simple acts of application of the treaty under articles 31, paragraph 3 (b), that is, in "every measure taken on the basis of the interpreted treaty".[186] The word "or" in article 31, paragraph 3 (a), thus does not describe a mutually exclusive relationship between "interpretation" and "application".

(5) The significance of an "application" of a treaty, for the purpose of its interpretation, is, however, not limited to the identification of the position that the State party concerned thereby assumes regarding its interpretation. Indeed, the way in which a treaty is applied not only contributes to determining the meaning of the treaty, but also to the identification of the degree to which the interpretation that the States parties have assumed is "grounded" and thus more or less firmly established.

(6) It should be noted that an "application" of the treaty does not necessarily reflect the position of a State party that such application is the only legally possible one under the treaty and under the circumstances.[187] Further, the concept of "application" does not

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[182] According to G. Haraszti, "… interpretation has the elucidation of the meaning of the text as its objective while application implies the specifying of the consequences devolving on the contracting parties" (see Haraszti, *Some Fundamental Problems* ... (footnote 54 above), p. 18); he recognizes, however, that "[a] legal rule manifesting itself in whatever form cannot be applied unless its content has been elucidated" (*ibid.*, p. 15).

[183] Harvard Draft Convention on the Law of Treaties, *American Journal of International Law Supp.*, vol. 29 (1935), p. 653, at pp. 938–939; Lord McNair, *The Law of Treaties* (Oxford, Clarendon Press, 1961), p. 372; Sinclair, *The Vienna Convention* ... (see footnote 6 above), p. 116; Report of the Study Group on fragmentation of international law, 2006 (A/CN.4/L.682 and Corr.1), para. 423; Gardiner, *Treaty Interpretation* (see footnote 5 above), pp. 28–30 and 238; Yasseen, "L'interprétation des traités…" (see footnote 6 above) p. 47; U. Linderfalk, "Is the hierarchical structure of articles 31 and 32 of the Vienna Convention real or not? Interpreting the rules of interpretation", *Netherlands International Law Review*, vol. 54, No. 1 (2007), pp. 133–154, at pp. 141–144 and p. 147; G. Distefano, "La pratique subséquente des États parties à un traité", *Annuaire français de droit international*, vol. 40 (1994), p. 44; Villiger, "The rules on interpretation …" (see footnote 47 above), p. 111.

[184] Gardiner, *Treaty Interpretation* (see footnote 5 above), p. 266; Linderfalk, *On the Interpretation of Treaties* (see footnote 54 above), p. 162; Karl, *Vertrag und spätere Praxis* ... (see footnote 62 above), pp. 114 and 118; Dörr, "Article 31 …" (see footnote 47 above), pp. 598–599, paras. 81 and 83.

[185] This second alternative was introduced at the proposal of Pakistan, but its scope and purpose was never addressed or clarified, see *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna 26 March-24 May 1968 and 9 April-22 May, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11, United Nations publications, Sales No. E.68.V.7), 31st meeting, 19 April 1968, p. 168, para. 53.

[186] See Linderfalk, *On the Interpretation of Treaties* (footnote 54 above), pp. 164–165 and 167; see also draft conclusions 2, para. 4, and 4, para. 3.

[187] See below draft conclusion 7, para. 1.

exclude certain conduct by non-State actors which the treaty recognizes as forms of its application[188] and which can hence constitute practice establishing the agreement of the parties. Finally, the legal significance of a particular conduct in the application of a treaty is not necessarily limited to its possible contribution to interpretation under article 31, but may also contribute to meeting the burden of proof[189] or to fulfilling the conditions of other rules.[190]

(7) Subsequent conduct that is not motivated by a treaty obligation is not "in the application of the treaty" or "regarding" its interpretation, within the meaning of article 31, paragraph 3. In the *Certain Expenses of the United Nations* case, for example, some judges doubted whether the continued payment by the Member States of the United Nations of their membership contributions signified acceptance of a certain practice of the Organization.[191] Judge Fitzmaurice formulated a well-known warning in this context, according to which "the argument drawn from practice, if taken too far, can be question-begging".[192] According to Fitzmaurice, it would be "hardly possible to infer from the mere fact that Member States pay, that they necessarily admit in all cases a positive legal obligation to do so".[193]

(8) Similarly, in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case, the International Court of Justice held that an effort by the parties to the Agreement of 1987 (on the submission of a dispute to the jurisdiction of the Court) to conclude an additional Special Agreement (which would have specified the subject matter of the dispute) did not mean that the conclusion of such an additional agreement was actually considered by the parties to be required for the establishment of the jurisdiction of the Court.[194]

(9) Another example of a voluntary practice that is not meant to be "in application of" or "regarding the interpretation" of a treaty concerns "complementary protection" in the context of refugee law. Persons who are denied refugee status under the Convention relating to the Status of Refugees are nonetheless often granted "complementary protection", which is equivalent to that under the Convention. States that grant complementary protection, however, do not consider themselves as acting "in the application of" the Convention or "regarding its interpretation".[195]

(10) It is sometimes difficult to distinguish relevant subsequent agreements or subsequent practice regarding the interpretation or in the application of a treaty under article 31, paragraph 3 (a) and (b), from other conduct or developments in the wider context of the

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[188] See Boisson de Chazournes, "Subsequent practice, practices, …" (footnote 24 above), p. 53, at pp. 54, 56 and 59–60.

[189] In the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, at p. 117, para. 105, the International Court of Justice denied that certain conduct (statements) satisfied the burden of proof with respect to the Russian Federation's compliance with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination between 1999 and July 2008, in particular because the conduct was not found to specifically relate to the Convention. According to Judge Simma, the burden of proof had been met to some degree, see Separate Opinion of Judge Simma, *ibid.*, pp. 199–223, paras. 23–57.

[190] In the case concerning the *Kasikili/Sedudu Island* (see footnote 8 above), the International Court of Justice analysed subsequent practice not only in the context of treaty interpretation but also in the context of acquisitive prescription (see p. 1092, para. 71, p. 1096, para. 79, and p. 1105, para. 97).

[191] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, I.C.J. Reports 1962*, p. 151, at pp. 201–202 (Separate Opinion of Judge Fitzmaurice) and pp. 189–195 (Separate Opinion of Judge Spender).

[192] *Ibid.*, p. 201.

[193] *Ibid.*

[194] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 6, at p. 16, para. 28.

[195] See A. Skordas, "General provisions: article 5", in *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary*, A. Zimmermann, ed. (Oxford, Oxford University Press, 2011), p. 682, para. 30; J. McAdam, *Complementary Protection in International Refugee Law* (Oxford, Oxford University Press, 2007), p. 21.

treaty, including from "contemporaneous developments" in the subject area of the treaty. Such a distinction is, however, important since only conduct regarding interpretation by the parties introduces their specific authority into the process of interpretation. The general rule seems to be that the more specifically an agreement or a practice is related to a treaty the more interpretative weight it can acquire under article 31, paragraph 3 (a) and (b).[196]

(11) The characterization of a subsequent agreement or subsequent practice under article 31, paragraph 3 (a) and (b), as assuming a position regarding the interpretation of a treaty often requires a careful factual and legal analysis. This point can be illustrated by examples from judicial and State practice.

(12) The jurisprudence of the International Court of Justice provides a number of examples. On the one hand, the Court did not consider the "joint ministerial communiqués" of two States to "be included in the conventional basis of the right of free navigation" since the "modalities for co-operation which they put in place are likely to be revised in order to suit the Parties".[197] The Court has also held, however, that the lack of certain assertions regarding the interpretation of a treaty, or the absence of certain forms of its application, constituted a practice that indicated the legal position of the parties according to which nuclear weapons were not prohibited under various treaties regarding poisonous weapons.[198] In any case, the exact significance of a collective expression of views of the parties can only be identified by a careful consideration as to whether and to what extent such expression is meant to be "regarding the interpretation" of the treaty. Accordingly, the Court held in the *Whaling in the Antarctic* case that "relevant resolutions and Guidelines [of the International Whaling Commission] that have been approved by consensus call upon States parties to take into account whether research objectives can practically and scientifically be achieved by using non-lethal research methods, but they do not establish a requirement that lethal methods be used only when other methods are not available".[199]

(13) When the Iran-United States Claims Tribunal was confronted with the question of whether the Claims Settlement Declaration obliged the United States to return military property to Iran, the Tribunal found, referring to the subsequent practice of the parties, that this treaty contained an implicit obligation of compensation in case of non-return:[200]

> "66. … Although Paragraph 9 of the General Declaration does not expressly state any obligation to compensate Iran in the event that certain articles are not returned because of the provisions of U.S. law applicable prior to 14 November 1979, the Tribunal holds that such an obligation is implicit in that Paragraph.
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> "68. Moreover, the Tribunal notes that the interpretation set forth in paragraph 66 above is consistent with the subsequent practice of the Parties in the application of the Algiers Accords and, particularly, with the conduct of the United States. Such a

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[196] On the "weight" of an agreement or practice as a means of interpretation, see draft conclusion 9 [8], paras. 1–3, below; for an example of the need, and also the occasional difficulty, to distinguish between specific conduct by the parties regarding the interpretation of a treaty and more general development, see *Maritime Dispute (Peru v. Chile), Judgment, I.C.J. Reports 2014*, p. 3, at pp. 41–58, paras. 103–151.

[197] *Dispute regarding Navigational and Related Rights* (see footnote 8 above), p. 234, para. 40; see also *Kasikili/Sedudu Island* (footnote 8 above), p. 1091, para. 68, where the Court implied that one of the parties did not consider that certain forms of practical cooperation were legally relevant for the purpose of the question of boundary at issue and thus did not agree with a contrary position of the other party.

[198] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 248, paras. 55–56; see also *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, at p. 815, para. 30; Gardiner, *Treaty Interpretation* (see footnote 5 above), pp. 262–264.

[199] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226, at p. 257, para. 83.

[200] See Iran-United States Claims Tribunal, *Islamic Republic of Iran and United States of America, Iran-United States Claims Tribunal Reports*, Partial Award No. 382-B1-FT vol. 19 (1989), pp. 294–295.

> practice, according to article 31 (3) (b) of the Vienna Convention, is also to be taken into account in the interpretation of a treaty. In its communication informing Iran, on 26 March 1981, that the export of defense articles would not be approved, the United States expressly stated that 'Iran will be reimbursed for the cost of equipment in so far as possible'."

This position was criticized by Judge Holtzmann in his dissenting opinion:

> "Subsequent conduct by a State party is a proper basis for interpreting a treaty only if it appears that the conduct was motivated by the treaty. Here there is no evidence, or even any argument, that the United States' willingness to pay Iran for its properties was in response to a perceived obligation imposed by Paragraph 9. Such conduct would be equally consistent with a recognition of a contractual obligation to make payment. In the absence of any indication that conduct was motivated by the treaty, it is incorrect to use that conduct in interpreting the treaty."[201]

Together, the majority opinion and the dissent clearly identify the need to analyse carefully whether the parties, by an agreement, or a practice assume a position "regarding the interpretation" of a treaty.

(14) The fact that States parties assume a position regarding the interpretation of a treaty may sometimes also be inferred from the character of the treaty or of a specific provision.[202] Whereas subsequent practice in the application of a treaty often consists of conduct by different organs of the State (executive, legislative, judicial or other) in the conscious application of a treaty at different levels (domestic and international), the European Court of Human Rights, for example, does not, for the most part, explicitly address the question of whether a particular practice was undertaken "regarding the interpretation" of the Convention.[203] Thus, when describing the domestic legal situation in the member States, the Court rarely asks whether a particular legal situation results from a legislative process during which the possible requirements of the Convention were discussed. The Court rather presumes that the member States, when legislating or otherwise acting in a particular way, are conscious of their obligations under the Convention and that they act in a way that reflects their understanding of their obligations.[204] The Inter-American Court of Human Rights has also on occasion used legislative practice as a means of interpretation.[205] Like the International Court of Justice, the European Court of Human Rights has occasionally even considered that the "lack of any apprehension" of the parties regarding a certain interpretation of the Convention may be indicative of their assuming a position regarding the interpretation of the treaty.[206]

(15) Article 118 of the Geneva Convention relative to the Treatment of Prisoners of War[207] provides that: "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities." The will of a prisoner of war not to be repatriated was intentionally not declared to be relevant by the States parties in order to prevent States from

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[201] Separate Opinion of Judge Holtzmann, Concurring in Part, Dissenting in Part, *ibid.*, at p. 304.

[202] See second report on subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/671), para. 15.

[203] See, for example, *Soering v. the United Kingdom*, no. 14038/88, 7 July 1989, ECHR Series A no. 161, para. 103; *Dudgeon v. the United Kingdom*, no. 7525/76, 22 October 1981, ECHR Series A No. 45, para. 60; *Demir and Baykara v. Turkey* [GC], no. 34503/97, 12 November 2008, ECHR-2008, para. 48; however, by way of contrast, compare with *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, ECHR 2005-I, para. 146; *Cruz Varas and others v. Sweden*, no. 15576/89, 20 March 1991, ECHR Series A no. 201, para. 100.

[204] See footnote 203 above; see further *Marckx v. Belgium*, no. 6833/74, 13 June 1979, ECHR Series A no. 31, para. 41; *Jorgic v. Germany*, no. 74613/01, 12 July 2007, ECHR 2007-III, para. 69; *Mazurek v. France*, no. 34406/97, 1 February 2000, ECHR 2000-II, para. 52.

[205] See, for example, *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* (see footnote 13 above), para. 12.

[206] *Banković et al. v. Belgium and 16 other contracting States* (dec.) [GC], no. 52207/99, ECHR 2001-XII, para. 62.

[207] See footnote 160 above.

abusively invoking the will of prisoners of war in order to delay repatriation.[208] ICRC has, however, always insisted as a condition for its participation that it may independently ascertain the will of a prisoner of war to be repatriated.[209] This approach, as far as it has been reflected in the practice of States parties, suggests that article 118 does not impose an absolute obligation to repatriate. It does not necessarily mean, however, that article 118 should be interpreted even more restrictively as demanding that the repatriation of a prisoner of war must not happen against his or her will. The ICRC Study on customary international humanitarian law carefully notes in its commentary on rule 128 A:

> "According to the Fourth Geneva Convention, no protected person may be transferred to a country 'where he or she may have reason to fear persecution for his or her political opinions or religious beliefs' [article 45, paragraph 4, of the Geneva Convention relative to the Protection of Civilian Persons in Time of War]. While the Third Geneva Convention does not contain a similar clause, practice since 1949 has developed to the effect that in every repatriation in which the ICRC has played the role of neutral intermediary, the parties to the conflict, whether international or non-international, have accepted the ICRC's conditions for participation, including that the ICRC be able to check prior to repatriation (or release in case of a non-international armed conflict), through an interview in private with the persons involved, whether they wish to be repatriated (or released)."[210]

(16) This formulation suggests that the State practice of respecting the will of the prisoner of war is limited to cases in which ICRC is involved and in which the organization has formulated such a condition. States have drawn different conclusions from this practice.[211] The 2004 United Kingdom Manual provides that:

> "A more contentious issue is whether prisoners of war *must* be repatriated even against their will. Recent practice of [S]tates indicates that they should not. It is United Kingdom policy that prisoners of war should not be repatriated against their will."[212]

(17) This particular combination of the words "must" and "should" indicates that the United Kingdom, like other States, considers the subsequent practice as demonstrating an interpretation of the treaty according to which the declared will of the prisoner of war may, but need not necessarily, be respected.[213]

(18) The preceding examples from the case law and State practice substantiate the need to identify and interpret carefully subsequent agreements and subsequent practice, in

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[208] C. Shields Delessert, *Release and Repatriation of Prisoners of War at the End of Active Hostilities* (Zurich, Schulthess, 1977), pp. 145–156 and pp. 171–175; see in general on the duty to repatriate, S. Krähenmann, "Protection of prisoners in armed conflict", in *The Handbook of International Humanitarian Law*, 3rd edition, D. Fleck, ed. (Oxford, Oxford University Press, 2013), pp. 359–412, at pp. 409–410.

[209] Thus, by its involvement, the ICRC tries to reconcile the interests in speedy repatriation and the respect of the will of prisoners of war (see Krähenmann, "Protection of prisoners in armed conflict" (footnote 208 above), pp. 409–410).

[210] J.-M. Henckaerts and L. Doswald-Beck, eds., *Customary International Humanitarian Law, Volume 1: Rules* (Cambridge, International Committee of the Red Cross and Cambridge University Press, 2005), p. 455 (footnotes omitted).

[211] J.-M. Henckaerts and L. Doswald-Beck, eds., *Customary International Humanitarian Law, Volume 2: Practice* (Cambridge, International Committee of the Red Cross and Cambridge University Press, 2005), pp. 2893–2894, paras. 844–855, and online update for Australia, Israel, the Netherlands and Spain, available from http://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule128_sectiond.

[212] United Kingdom of Great Britain and Northern Ireland, Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford, Oxford University Press, 2004), pp. 205–206, para. 8.170 (footnote omitted).

[213] See also United States, Department of Defense, *Law of War Manual* (2015, updated 2016), sect. 9.37.4.2.: "[T]he [Geneva Convention relative to the Treatment of Prisoners of War] does not itself change accepted principles of international law under which asylum is applicable to [prisoners of war], and the Detaining Power may, but is not required to, grant asylum.". Available from www.defense.gov.

particular to ask whether the parties, by an agreement or a practice, assume a position regarding the interpretation of a treaty or whether they are motivated by other considerations.[214]

Paragraph 1, second sentence — temporary non-application of a treaty or modus vivendi

(19) The second sentence of paragraph 1 is merely illustrative. It specifically refers to two types of cases that need to be distinguished from practice regarding the interpretation of a treaty, and leaves room for other such cases.

(20) A common subsequent practice does not necessarily indicate an agreement between the parties regarding the interpretation of a treaty, but may instead signify their agreement temporarily not to apply the treaty,[215] or an agreement on a practical arrangement (*modus vivendi*).[216] The following example is illustrative.

(21) Article 7 of the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field provides that: "A distinctive and uniform flag shall be adopted for hospitals, ambulances and evacuation parties. … [The] flag … shall bear a red cross on a white ground."[217] During the Russo-Turkish War of 1877-1878, the Ottoman Empire declared that it would in the future use the red crescent on a white ground to mark its own ambulances, while respecting the red cross sign protecting enemy ambulances and stated that the distinctive sign of the Convention "'had so far prevented Turkey from exercising its rights under the Convention because it gave offence to the Muslim soldiers'".[218] This declaration led to a correspondence between the Ottoman Empire, Switzerland (as depositary) and the other parties, which resulted in the acceptance of the red crescent only for the duration of the conflict.[219] At The Hague Peace Conferences of 1899 and 1907 and during the 1906 Conference for the Revision of the Geneva Convention of 1864, the Ottoman Empire, Persia and Siam unsuccessfully requested the inclusion of the red crescent, the red lion and sun, and the red flame in the Convention.[220] The Ottoman Empire and Persia, however, at least gained the acceptance of "reservations" that they formulated to that effect in 1906.[221] This acceptance of the reservations of the Ottoman Empire and Persia in 1906 did not mean, however, that the parties had accepted that the 1864 Geneva Convention had been interpreted in a particular way prior to 1906 by subsequent unopposed practice. The practice by the Ottoman Empire and Persia was seen rather, at least until 1906, as not being covered by the 1864 Geneva Convention, but it was

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[214] A/CN.4/671, paras. 11–18. See also L. Crema, "Subsequent agreements and subsequent practice within and outside the Vienna Convention", in Nolte, *Treaties and Subsequent Practice* (see footnote 11 above), pp. 25–26.

[215] See A/CN.4/671, p. 33, para. 71.

[216] *Dispute regarding Navigational and Related Rights* (see footnote 8 above), pp. 234–235, para. 40; *Pulp Mills on the River Uruguay* (see footnote 8 above), p. 14, at pp. 65–66, paras. 138–140; J. Crawford, "A consensualist interpretation of article 31 (3) of the Vienna Convention on the Law of Treaties", in Nolte, *Treaties and Subsequent Practice* (see footnote 11 above), p. 32; for another example, see A/CN.4/671, para. 72; and J.R. Crook, "Contemporary practice of the United States", *American Journal of International Law*, vol. 105 (2011), pp. 775 *et seq.*, at pp. 809–812.

[217] See ICRC, *International Red Cross Handbook*, 12th edition (Geneva, 1983), p. 20.

[218] "Bulletin international des Sociétés de Secours aux Militaires blessés", No. 29 (January 1877), pp. 35–37, quoted in F. Bugnion, *The Emblem of the Red Cross. A Brief History* (Geneva, ICRC, 1977), p. 15.

[219] *Ibid.*, No. 31 (July 1877), p. 89, quoted in Bugnion, *The Emblem of the Red Cross* ... (see footnote 218 above), p. 18.

[220] Bugnion, *The Emblem of the Red Cross* ... (see footnote 218 above), pp. 19–31.

[221] Joined by Egypt upon accession in 1923, see Bugnion, *The Emblem of the Red Cross* ... (footnote 218 above), pp. 23–26; it was only on the occasion of the revision of the Geneva Conventions in 1929, when Turkey, Persia and Egypt claimed that the use of other emblems had become a *fait accompli* and that those emblems had been used in practice without giving rise to any objections, that the Red Crescent and the Red Lion and Sun were finally recognized as a distinctive sign by article 19, paragraph 2, of the 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (League of Nations, *Treaty Series*, vol. 118, No. 2733, p. 303).

accepted as a temporary and exceptional measure that left the general treaty obligation unchanged.

Paragraph 2 — variety of forms

(22) The purpose of paragraph 2 of draft conclusion 6 is to acknowledge the variety of forms that subsequent agreements and subsequent practice can take under article 31, paragraph 3 (a) and (b). The Commission has recognized that subsequent practice under article 31, paragraph 3 (b), consists of any "conduct" in the application of a treaty, including under certain circumstances, inaction, which may contribute to establishing an agreement regarding the interpretation of the treaty.[222] Depending on the treaty concerned, this includes not only externally oriented conduct, such as official acts, statements and voting at the international level, but also internal legislative, executive and judicial acts, and may even include conduct by non-State actors that is attributable to one or more States parties and that falls within the scope of what the treaty conceives as forms of its application.[223] Thus, the individual conduct that may contribute to a subsequent practice under article 31, paragraph 3 (b), need not meet any particular formal criteria.[224]

(23) Subsequent practice at the international level need not necessarily be joint conduct.[225] A parallel conduct by parties may suffice. It is a separate question whether parallel activity actually articulates a sufficient common understanding (agreement) regarding the interpretation of a treaty in a particular case (see draft conclusion 10, paragraph 1, below).[226] Subsequent agreements can be found in legally binding treaties as well as in non-binding instruments like memorandums of understanding.[227] Subsequent agreements can also be found in certain decisions of a conference of States parties (see draft conclusion 11, paragraphs 1, 2 and 3, below).

Paragraph 3 — identification of subsequent practice under article 32

(24) Paragraph 3 of this draft conclusion provides that in identifying subsequent practice under article 32, the interpreter is required to determine whether, in particular, conduct by one or more parties is in the application of the treaty.[228] The Commission decided to treat such subsequent practice under article 32 (see draft conclusion 4, paragraph 3)[229] n a separate paragraph for the sake of analytical clarity (see draft conclusion 7, paragraph 2, and draft conclusion 9, paragraph 3, below), but it does not thereby call into question the unity of the process of interpretation. The considerations that are pertinent for the identification of subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), also apply, *mutatis mutandis*, to the identification of subsequent practice under article 32. Thus, agreements between less than all parties to a treaty regarding the interpretation of a treaty or its application are a form of subsequent practice under article 32.

(25) An example of a practical arrangement is the memorandum of understanding between the Department of Transportation of the United States of America and the

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[222] See above commentary to draft conclusion 4, paras. (17)–(20).

[223] See, for example, commentary to draft conclusion 5 above; Boisson de Chazournes, "Subsequent practice …" (footnote 24 above), pp. 54, 56 and 59–60; Gardiner, *Treaty Interpretation* (footnote 5 above), pp. 257–259; see also *Maritime Dispute (Peru v. Chile), Judgment, I.C.J. Reports 2014*, p. 3, at pp. 42–45, paras. 103–111 and pp. 48–49, paras. 119–122, and p. 50, para. 126; Dörr, "Article 31 …" (see footnote 47 above), pp. 597–598, para. 79.

[224] Gardiner, *Treaty Interpretation* (see footnote 5 above), pp. 254–255.

[225] *Case concerning the Temple of Preah Vihear* (see footnote 97 above), p. 33; *Kasikili/Sedudu Island* (see footnote 8 above), p. 1213, para. 17 (Dissenting Opinion of Judge Parra-Aranguren).

[226] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007*, p. 659, at p. 737, para. 258; but see *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 18, at pp. 83–84, para. 117, where the Court recognized concessions granted by the parties to the dispute as evidence of their tacit agreement; see also *Maritime Dispute (Peru v. Chile)* (footnote 223 above).

[227] Gardiner, *Treaty Interpretation* (see footnote 5 above), pp. 244 and 250.

[228] See above, paras. (1)–(4) of the present commentary; and A/CN.4/671, paras. 3–5.

[229] See above commentary to draft conclusion 2, para. (10).

Secretaría de Comunicaciones y Transportes of the United Mexican States on International Freight Cross-Border Trucking Services of 6 July 2011.[230] The memorandum of understanding does not refer to Canada, the third party of the North American Free Trade Agreement (NAFTA), and specifies that it "is without prejudice to the rights and obligations of the United States and Mexico under NAFTA". These circumstances suggest that the memorandum of understanding does not claim to constitute an agreement regarding the interpretation of NAFTA under article 31, paragraph 3 (a) or (b), but that it rather remains limited to being a practical arrangement between a limited number of parties that is subject to challenge by other parties or by a judicial or quasi-judicial institution.

Conclusion 7

Possible effects of subsequent agreements and subsequent practice in interpretation

1. Subsequent agreements and subsequent practice under article 31, paragraph 3, contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty. This may result in narrowing, widening, or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties.

2. Subsequent practice under article 32 may also contribute to the clarification of the meaning of a treaty.

3. It is presumed that the parties to a treaty, by an agreement or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it. The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized. The present draft conclusion is without prejudice to the rules on the amendment or modification of treaties under the 1969 Vienna Convention and under customary international law.

Commentary

Paragraph 1, first sentence — clarification of the meaning of a treaty

(1) Draft conclusion 7 deals with the possible effects of subsequent agreements and subsequent practice on the interpretation of a treaty. The purpose is to indicate how subsequent agreements and subsequent practice may contribute to the clarification of the meaning of a treaty. Paragraph 1 emphasizes that subsequent agreements and subsequent practice must be seen in their interaction with other means of interpretation (see draft conclusion 2 , paragraph 5).[231] They are therefore not necessarily in themselves conclusive.

(2) Subsequent agreements and subsequent practice, like all means of interpretation, may have different effects on the interactive process of interpretation of a treaty, which consists of placing appropriate emphasis in any particular case on the various means of interpretation in a "single combined operation".[232] The taking into account of subsequent agreements and subsequent practice under articles 31, paragraph 3, and 32 may thus contribute to a clarification of the meaning of a treaty[233] in the sense of a narrowing down

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[230] Crook, "Contemporary practice of the United States" (see footnote 216 above), pp. 809–812; see also: Mexico, *Diario Oficial de la Federación* (7 July 2011), "Decreto por el que se modifica el artículo 1 del diverso por el que se establece la Tasa Aplicable durante 2003, del Impuesto General de Importación, para las mercancías originarias de América del Norte", publicado el 31 de diciembre de 2002, por lo que respecta a las mercancías originarias de los Estados Unidos de América (www.dof.gob.mx).

[231] See above commentary to draft conclusion 2, para. 5, paras. (12)–(15).

[232] *Ibid.*

[233] The terminology follows guideline 1.2 (Definition of interpretative declarations) of the Commission's Guide to Practice on Reservations to Treaties: "'Interpretative declaration' means a unilateral statement … whereby [a] State or [an] international organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions." (*Official records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), chap. IV, guideline 1.2); see also commentary to guideline 1.2, para. (18) (A/66/10/Add.1).

(specifying) of possible meanings of a particular term or provision, or of the scope of the treaty as a whole (see paragraphs (4), (6), (7), (10) and (11) below). Alternatively, such taking into account may contribute to a clarification in the sense of confirming a wider interpretation. Finally, it may contribute to understanding the range of possible interpretations available to the parties, including the scope for the exercise of discretion by the parties under the treaty (see paragraphs (12) to (15) below).

(3) International courts and tribunals usually begin their reasoning in a given case by determining the "ordinary meaning" of the terms of the treaty.[234] Subsequent agreements and subsequent practice mostly enter into their reasoning at a later stage when courts ask whether such conduct confirms or modifies the result arrived at by the initial interpretation of the ordinary meaning (or by other means of interpretation).[235] If the parties do not wish to convey the ordinary meaning of a term, but rather a special meaning in the sense of article 31, paragraph 4, subsequent agreements and subsequent practice may shed light on this special meaning. The following examples[236] illustrate how subsequent agreements and subsequent practice as means of interpretation can contribute, in their interaction with other means in the process of interpretation, to the clarification of the meaning of a treaty.

(4) Subsequent agreements and subsequent practice can help identify the "ordinary meaning" of a particular term by confirming a narrow interpretation of different possible shades of meaning of the term. This was the case, for example,[237] in the *Nuclear Weapons Advisory Opinion* where the International Court of Justice determined that the expressions "poison or poisonous weapons":

> "… have been understood, in the practice of States, in their ordinary sense as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate. This practice is clear, and the parties to those instruments have not treated them as referring to nuclear weapons."[238]

(5) On the other hand, subsequent practice may prevent specifying the meaning of a general term to just one of different possible meanings.[239] For example, in the *Case concerning rights of nationals of the United States of America in Morocco*, the Court stated:

> "The general impression created by an examination of the relevant materials is that those responsible for the administration of the customs … have made use of all the various elements of valuation available to them, though perhaps not always in a consistent manner.
>
> "In these circumstances, the Court is of the opinion that Article 95 lays down no strict rule on the point in dispute. It requires an interpretation which is more flexible than either of those which are respectively contended for by the Parties in this case."[240]

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[234] See above commentary to draft conclusion 2, para. 5, para. (14); *Competence of Assembly regarding admission to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 4, at p. 8.

[235] See, for example, *Sovereignty over Pulau Ligitan and Pulau Sipadan* (footnote 8 above), p. 656, paras. 59–61 and p. 665, para. 80; *Territorial Dispute* (footnote 8 above), p. 34, paras. 66–71; *Dispute regarding Navigational and Related Rights* (footnote 8 above), p. 290 (Declaration of Judge *ad hoc* Guillaume).

[236] For more examples see Nolte, "Jurisprudence under special regimes" (footnote 11 above), pp. 210–306.

[237] See also *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, at p. 815, para. 30; *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, at p. 306, para. 67; *Competence of Assembly regarding admission to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 4, at p. 9.

[238] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 248, para. 55.

[239] *Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15, at p. 25.

[240] *Case concerning Rights of Nationals of the United States of America in Morocco, Judgment of August 27th, 1952, I.C.J. Reports 1952*, p. 176, at p. 211.

(6) Different forms of practice may contribute to both a narrow and a broad interpretation of different terms in the same treaty.[241]

(7) A treaty shall be interpreted in accordance with the ordinary meaning of its terms "in their context" (article 31, paragraph 1). Subsequent agreements and subsequent practice, in interaction with this particular means of interpretation, may also contribute to identifying a narrower or broader interpretation of a term of a treaty.[242] In the *Inter-Governmental Maritime Consultative Organization Advisory Opinion*, for example, the International Court of Justice had to determine the meaning of the expression "eight … largest ship-owning nations" under article 28 (a) of the Convention on the International Maritime Organization (IMO)[243] since this concept of "largest ship-owning nations" permitted different interpretations (such as determination by "registered tonnage" or by "property of nationals"), and since there was no pertinent practice of the organization or its members under article 28 (a) itself, the Court turned to practice under other provisions in the Convention and held:

> "This reliance upon registered tonnage in giving effect to different provisions of the Convention … persuade[s] the Court to view that it is unlikely that when [article 28 (a)] was drafted and incorporated into the Convention it was contemplated that any criterion other than registered tonnage should determine which were the largest shipping owning nations."[244]

(8) Together with the text and the context, article 31, paragraph 1, accords importance to the "object and purpose" for its interpretation.[245] Subsequent agreements and subsequent practice may also contribute to a clarification of the object and purpose of a treaty[246] or reconcile invocations of the "object and purpose" of a treaty with other means of interpretation.

(9) In the *Maritime Delimitation in the Area between Greenland and Jan Mayen*[247] and *Oil Platforms* cases,[248] for example, the International Court of Justice clarified the object and purpose of bilateral treaties by referring to subsequent practice of the parties. And in the *Land and Maritime Boundary between Cameroon and Nigeria* case, the Court held:

> "From the treaty texts and the practice analysed at paragraphs 64 and 65 above, it emerges that the Lake Chad Basin Commission is an international organization exercising its powers within a specific geographical area; that it does not however

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[241] See, *mutatis mutandis*, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, I.C.J. Reports 1962*, p. 151, where the International Court of Justice interpreted the term "expenses" broadly and "action" narrowly in the light of the respective subsequent practice of the United Nations, at pp. 158–161 ("expenses") and pp. 164–165 ("action").

[242] See, for example, *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69, at p. 87, para. 40.

[243] United Nations, *Treaty Series*, vol. 289, No. 4214, p. 3.

[244] *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, I.C.J. Reports 1960*, p. 150, at p. 169; see also pp. 167–169; *obiter dicta*: *Proceedings pursuant to the OSPAR Convention (Ireland-United Kingdom)*, 2 July 2003, UNRIAA, vol. XXIII (Sales No. E/F.04.V.15), pp. 59–151, at p. 99, para. 141.

[245] Gardiner, *Treaty Interpretation* (see footnote 5 above), pp. 211 and 219.

[246] *Ibid.*, pp. 212–215; see also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 31, para. 53; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 179, para. 109; R. Higgins, "Some observations on the inter-temporal rule in international law", in *Theory of International Law at the Threshold of the 21st Century*, J. Makarczyk, ed. (The Hague, Kluwer Law International, 1996), pp. 173–181, at p. 180; Distefano, "La pratique subséquente …" (see footnote 183 above), pp. 52–54; Crema, "Subsequent agreements and subsequent practice …" (footnote 214 above), p. 21.

[247] *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 38, at p. 50, para. 27.

[248] *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, at pp. 813 and 815, paras. 27 and 30.

have as its purpose the settlement at a regional level of matters relating to the maintenance of international peace and security and thus does not fall under Chapter VIII of the Charter."[249]

Paragraph 1, second sentence — narrowing or widening or otherwise determining the range of possible interpretation

(10) State practice other than in judicial or quasi-judicial contexts confirms that subsequent agreements and subsequent practice not only contribute to specifying the meaning of a term in the sense of narrowing the possible meanings of the rights and obligations under a treaty, but may also indicate a wider range of acceptable interpretations or a certain scope for the exercise of discretion that a treaty grants to States.[250]

(11) For example, whereas the ordinary meaning of the terms of article 5 of the 1944 Convention on International Civil Aviation[251] do not appear to require a charter flight to obtain permission to land while *en route*, long-standing State practice requiring such permission has led to general acceptance that this provision is to be interpreted as requiring permission.[252] Another case is article 22, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations,[253] which provides that the means of transport used by a mission shall be immune from search, requisition, attachment or execution. While police enforcement against diplomatic premises or by stopping and searching means of transport will usually be met with protests by States,[254] the towing of diplomatic cars that have violated local traffic and parking laws generally has been regarded as permissible in practice.[255] This practice suggests that, while punitive measures against diplomatic vehicles are forbidden, cars can be stopped or removed if they prove to be an immediate danger or obstacle for traffic and/or public safety.[256] In that sense, the meaning of the term "execution" — and, thus, the

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[249] See also *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, at p. 306, para. 67.

[250] This is not to suggest that there may ultimately be different interpretations of a treaty, but rather that the treaty may accord the parties the possibility to choose from a spectrum of different permitted acts, see Gardiner, *Treaty Interpretation* (footnote 5 above), pp. 32–33 and p. 268, quoting the House of Lords in *R v. Secretary of State for the Home Department, ex parte Adan* [2001] AC 477: "... It is necessary to determine the autonomous meaning of the relevant treaty provision. ... It follows that, as in the case of other multilateral treaties, the Refugee Convention must be given an independent meaning derivable from the sources mentioned in articles 31 and 32 [of the 1969 Vienna Convention] and without taking colour from distinctive features of the legal system of any individual contracting [S]tate. In principle, therefore, there can only be one true interpretation of a treaty. ... In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous international meaning of the treaty. And there can only be one true meaning" (The Law Reports, *Appeal Cases 2001*, vol. 2, at pp. 515–517 (Lord Steyn)).

[251] United Nations, *Treaty Series*, vol. 15, No. 102, p. 2.

[252] S.D. Murphy, "The relevance of subsequent agreement and subsequent practice for the interpretation of treaties", in Nolte, *Treaties and Subsequent Practice* (see footnote 11 above), p. 85; A. Aust, *Modern Treaty Law and Practice* (see footnote 134 above), p. 215.

[253] United Nations, *Treaty Series*, vol. 500, No. 7310, p. 95.

[254] E. Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, Oxford Commentaries on International Law, 4th edition (Oxford, Oxford University Press,2016), pp. 131–133; J. Salmon, *Manuel de droit diplomatique* (Brussels, Bruylant, 1994), p. 208, para. 315.

[255] See, for example, Australia, Department of Foreign Affairs and Trade, *Privileges and Immunities of Foreign Representatives* (http://dfat.gov.au/about-us/publications/corporate/protocol-guidelines/Documents/A21.pdf); Iceland, Protocol Department, Ministry of Foreign Affairs, *Diplomatic Handbook* (Reykjavik, 2009), p. 14 (www.mfa.is/media/PDF/Diplomatic_Handbook.PDF); United Kingdom, see the statement of the Parliamentary Under-Secretary of State, Home Office (Lord Elton) in the House of Lords, HL Deb, 12 December 1983, vol. 446 cc3-4; United States, see M. Nash (Leich), "Contemporary practice of the United States relating to international law", *American Journal of International Law*, vol. 88, No. 2 (April 1994), p. 312, at pp. 312–313.

[256] Denza, *Diplomatic Law* ... (see footnote 254 above), pp. 132–133; M. Richtsteig, *Wiener Übereinkommen über diplomatische und konsularische Beziehungen: Entstehungsgeschichte, Kommentierung, Praxis*, 2nd edition (Baden-Baden, Germany, Nomos, 2010), p. 70.

scope of protection accorded to means of transportation — is specified by the subsequent practice of parties.

(12) Another example concerns article 12 of Protocol II[257] to the 1949 Geneva Conventions, which provides:

> "Under the direction of the competent authority concerned, the distinctive emblem of the Red Cross, Red Crescent or Red Lion and Sun on a white ground shall be displayed by medical and religious personnel and medical units, and on medical transports. It shall be respected in all circumstances. It shall not be used improperly."

Although the term "shall" suggests that it is obligatory for States to use the distinctive emblem for marking medical personnel and transports under all circumstances, subsequent practice suggests that States may possess some discretion with regard to its application.[258] As armed groups have in recent years specifically attacked medical convoys that were well recognizable due to the protective emblem, States have in certain situations refrained from marking such convoys with a distinctive emblem. Responding to a parliamentary question on its practice in Afghanistan, the Government of Germany has stated that:

> "As other contributors of ISAF contingents, the Federal Armed Forces have experienced that marked medical vehicles have been targeted. Occasionally, these medical units and vehicles, clearly distinguished as such by their protective emblem, have even been preferred as targets. The Federal Armed Forces have thus, along with Belgium, France, the United Kingdom, Canada and the United States, decided within ISAF to cover up the protective emblem on medical vehicles."[259]

(13) Such practice by States may confirm an interpretation of article 12 according to which the obligation to use the protective emblem[260] under exceptional circumstances allows a margin of discretion for the parties.

(14) A treaty provision that grants States parties an apparently unconditional right may raise the question of whether their discretion in exercising this right is limited by the purpose of the rule. For example, according to article 9 of the Vienna Convention on Diplomatic Relations, the receiving State may notify the sending State, without having to give reasons, that a member of the mission is *persona non grata*. States mostly issue such notifications in cases in which members of the mission were found or suspected of having engaged in espionage activities or of having committed other serious violations of the law of the receiving State or caused significant political irritation.[261] However, States have also made such declarations in other circumstances, such as when envoys caused serious injury to a third party,[262] or committed repeated infringements of the law,[263] or even to enforce

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[257] See footnote 161 above.

[258] Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Dordrecht, ICRC and Martinus Nijhoff, 1987), p. 1440, paras. 4742–4744; H. Spieker, "Medical transportation", in *Max Planck Encyclopedia of Public International Law* (www.mpepil.com), paras. 7–12; see also the less stringent future tense in the French version "sera arboré".

[259] Deutscher Bundestag, "Antwort der Bundesregierung: Rechtlicher Status des Sanitätspersonals der Bundeswehr in Afghanistan", 9 April 2010, Bundestagsdrucksache 17/1338, p. 2 (translation by the Special Rapporteur).

[260] Spieker, "Medical transportation" (see footnote 258 above), para. 12.

[261] See Denza, *Diplomatic Law* ... (footnote 254 above), pp. 64–73, with further references to declarations in relation to espionage; see also Salmon, *Manuel de droit diplomatique* (footnote 254 above), p. 484, para. 630; and Richtsteig, *Wiener Übereinkommen über diplomatische* ... (footnote 256 above), p. 30.

[262] The Netherlands, Protocol Department, Ministry of Foreign Affairs, *Protocol Guide for Diplomatic Missions and Consular Posts*. Available from www.government.nl/government/documents/leaflets/2015/04/15/protocol-guide-for-diplomatic-missions-en-consular-posts.

[263] France, Ministère des affaires étrangères et du développement, *Guide for Foreign Diplomats Serving in France: Immunities — Respect for Local Laws and Regulations* (www.diplomatie.gouv.fr/en/ministry/guide-for-foreign-diplomats/immunities/article/respect-for-local-laws-and); Turkey, Ministry of Foreign Affairs, traffic regulations to be followed by foreign missions in Turkey, Principal Circular Note 63552, Traffic Regulations 2005/PDGY/63552 (6 April

their drink-driving laws.[264] It is even conceivable that declarations are made without clear reasons or for purely political motives. Other States do not seem to have asserted that such practice constitutes an abuse of the power to declare members of a mission as *personae non gratae*. Thus, such practice confirms that article 9 provides an unconditional right.[265]

Paragraph 2 —subsequent practice under article 32

(15) Paragraph 2 of draft conclusion 7 concerns possible effects of subsequent practice under article 32 (see draft conclusion 4, paragraph 3), which does not reflect an agreement of all parties regarding the interpretation of a treaty. Such practice, as a supplementary means of interpretation, can confirm the interpretation that the interpreter has reached in the application of article 31, or determine the meaning when the interpretation according to article 31 leaves the meaning ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable. Article 32 thereby makes a distinction between a use of preparatory work or of subsequent practice to confirm a meaning arrived at under article 31 and its use to "determine" the meaning. Hence, recourse may be had to subsequent practice under article 32 not only to determine the meaning of the treaty in certain circumstances, but also — and always — to confirm the meaning resulting from the application of article 31.[266]

(16) Subsequent practice under article 32 may contribute, for example, to reducing possible conflicts when the "object and purpose" of a treaty as a whole appears to be in tension with specific purposes of certain of its rules.[267] In the *Kasikili/Sedudu Island* case, for example, the International Court of Justice emphasized that the "parties sought both to secure for themselves freedom of navigation on the river and to delimit as precisely as possible their respective spheres of influence".[268] The Court thereby reconciled a possible

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2005) (www.mfa.gov.tr/06_04_2005--63552-traffic-regulations.en.mfa); United Kingdom, Foreign and Commonwealth Office, Circular dated 19 April 1985 to the Heads of Diplomatic Missions in London, reprinted in G. Marston, "United Kingdom materials on international law 1985", *British Yearbook of International Law 1985*, vol. 56, p. 437.

[264] See Canada, Foreign Affairs, Trade and Development, Revised Impaired Driving Policy (www.international.gc.ca/protocol-protocole/vienna_convention_idp-convention_vienne_vfa.aspx?lang=eng); United States, Department of State, Diplomatic Note 10-181 of the Department of State (24 September 2010) (www.state.gov/documents/organization/149985.pdf), pp. 8–9.

[265] See G. Hafner, "Subsequent agreements and practice: between interpretation, informal modification, and formal amendment", in Nolte, *Treaties and Subsequent Practice* (see footnote 11 above), p. 105, at p. 112, for an even more far-reaching case under article 9 of the Vienna Convention on Diplomatic Relations.

[266] WTO Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China — Publications and Audiovisual Products)*, WT/DS363/AB/R, adopted 19 January 2010, para. 403; "Although the Panel's application of [a]rticle 31 of the Vienna Convention to 'Sound recording distribution services' led it to a 'preliminary conclusion' as to the meaning of that entry, the Panel nonetheless decided to have recourse to supplementary means of interpretation to *confirm* that meaning. We note, in this regard, that China's argument on appeal appears to assume that the Panel's analysis under [a]rticle 32 of the *Vienna Convention* would *necessarily* have been different if the Panel had found that the application of [a]rticle 31 left the meaning of 'Sound recording distribution services' ambiguous or obscure, and if the Panel had, therefore, resorted to [a]rticle 32 to *determine*, rather than to *confirm*, the meaning of that term. We do not share this view. The elements to be examined under [a]rticle 32 are distinct from those to be analysed under [a]rticle 31, but it is the same elements that are examined under [a]rticle 32 irrespective of the outcome of the [a]rticle 31 analysis. Instead, what may differ, depending on the results of the application of [a]rticle 31, is the weight that will be attributed to the elements analysed under [a]rticle 32." See also Villiger, *Commentary* ... (footnote 23 above), p. 447, para. 11.

[267] See WTO Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products — AB-1998-4*, WT/DS58/AB/R, adopted 6 November 1998, para. 17 ("... most treaties have no single, undiluted object and purpose but rather a variety of different, and possibly conflicting, objects and purposes"); Gardiner, *Treaty Interpretation* (see footnote 5 above), p. 216.

[268] *Kasikili/Sedudu Island* (see footnote 8 above), p. 1074, para. 45.

tension by taking into account a certain subsequent practice by only one of the parties as a supplementary means of interpretation (under article 32).[269]

(17) Another example of subsequent practice under article 32 concerns the term "feasible precautions" in article 57, paragraph 2 (ii), of Protocol I[270] to the 1949 Geneva Conventions. This term has been used in effect by article 3, paragraph 4, of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) of 10 October 1980,[271] which provides that: "Feasible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations." This language has come to be accepted by way of subsequent practice in many military manuals as a general definition of "feasible precautions" for the purpose of article 57, paragraph (2) (ii), of Protocol I to the 1949 Geneva Conventions.[272]

(18) The identification of subsequent practice under articles 31, paragraph 3 (b), and 32 has sometimes led domestic courts to arrive at broad or narrow interpretations. For example, the United Kingdom House of Lords interpreted the term "damage" under article 26, paragraph 2, of the Warsaw Convention as more generally including "loss", invoking the subsequent conduct of the parties.[273] On the other hand, the United States Supreme Court, having regard to the subsequent practice of the parties, decided that the term "accident" in article 17 of the 1929 Warsaw Convention should be interpreted narrowly in the sense that it excluded events that were not caused by an unexpected or unusual event.[274] Another example for a restrictive interpretation is a decision in which the Federal Court of Australia interpreted the term "impairment of dignity" under article 22 of the Vienna Convention on Diplomatic Relations as only requiring the receiving State to protect against breaches of the peace or the disruption of essential functions of embassies, and not against any forms of nuisance or insult.[275]

(19) Domestic courts, in particular, sometimes refer to decisions from other domestic jurisdictions and thus engage in a "judicial dialogue" even if no agreement of the parties can thereby be established.[276] Apart from thereby applying article 32, such references may add to the development of a subsequent practice together with other domestic courts.[277]

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[269] *Ibid.*, p. 1078, para. 55 and p. 1096, para. 80.

[270] *Ibid.*

[271] United Nations, *Treaty Series*, vol. 1342, No. 22495, p. 137.

[272] For the military manuals of Argentina (1989), Canada (2001) and the United Kingdom (2004), see Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, volume 2* … (footnote 211 above), pp. 359–360, paras. 160–164 and the online update for the military manual of Australia (2006) (www.icrc.org/customary-ihl/eng/docs/v2_rul_rule15_sectionc); see also Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols* … (footnote 258 above), p. 683, para. 2202.

[273] United Kingdom, House of Lords, *Fothergill v. Monarch Airlines Ltd.* [1981] AC 251, at p. 278 (Lord Wilberforce) and p. 279 (Lord Diplock); similarly, Germany, Federal Court (Civil Matters), BGHZ, vol. 84, p. 339, at pp. 343–344.

[274] United States, Supreme Court, *Air France v. Saks*, 470 U.S. 392, pp. 403–404.

[275] Australia, Federal Court of Australia, *Commissioner of the Australian Federal Police and the Commonwealth of Australia v. Geraldo Magno and Ines Almeida* [1992] FCA 566, paras. 30–35 (Einfeld J.); see also United Kingdom, House of Lords, *R (Mullen) v. Secretary of State for the Home Department* [2004] UKHL 18, paras. 47–48 (Lord Steyn).

[276] See, for example, United States, Supreme Court, *Air France v. Saks*, 470 U.S. 392, pp. 397–407; United States, Supreme Court, *Abbott v. Abbott* 560 U.S. (2010), Opinion of the Court (delivered by Justice Kennedy), Slip Opinion (www.supremecourt.gov/opinions/09pdf/08-645.pdf) (accessed 9 June 2016), at pp. 12–16; Germany, Federal Administrative Court, BVerwGE, vol. 139, p. 272, at pp. 288–289; High Court of Australia, *Andrew John Macoun v. Commissioner of Taxation* [2015] HCA 44, at pp. 75–82; P. Wall, "A marked improvement: The High Court of Australia's approach to treaty interpretation in *Macoun v. Commissioner of Taxation* [2015] HCA 44" (case note), *Melbourne Journal of International Law*, vol. 17 (2016), pp. 170–188.

[277] A. Tzanakopulos, "Judicial dialogue as a means of interpretation", in *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence*, H.P. Aust and G. Nolte, eds. (Oxford, Oxford University Press, 2016), p. 72, at p. 94; E. Benvenisti, "Reclaiming democracy:

However, the line between an appropriate use and a selective invocation of decisions of other domestic courts may be thin.[278] Lord Hope of the United Kingdom House of Lords, quoting the Vienna rules of interpretation, has provided a general orientation when he stated:

> "In an ideal world the Convention should be accorded the same meaning by all who are party to it. So case law provides a further potential source of evidence. Careful consideration needs to be given to the reasoning of courts of other jurisdictions which have been called upon to deal with the point at issue, particularly those which are of high standing. Considerable weight should be given to an interpretation which has received general acceptance in other jurisdictions. On the other hand, a discriminating approach is required if the decisions conflict, or if there is no clear agreement between them."[279]

(20) Much depends on how this general approach is applied. For example, selective invocation of the decisions of one particular national jurisdiction or the practice of a particular group of States should be avoided.[280] On the other hand, it may be appropriate, in a case in which the practice in different domestic jurisdictions diverges, to emphasize the practice of a representative group of jurisdictions[281] and to give more weight to the decisions of higher courts.[282]

Paragraph 3 — interpretation versus modification or amendment

(21) Paragraph 3 of draft conclusion 7 addresses the question of how far the interpretation of a treaty can be influenced by subsequent agreements and subsequent practice in order to remain within the realm of what is considered interpretation under article 31, paragraph 3 (a) and (b). The paragraph reminds the interpreter that agreements may serve to amend or modify a treaty, but that such subsequent agreements are subject to article 39 of the 1969 Vienna Convention and should be distinguished from subsequent agreements under article 31, paragraph 3 (a). The second sentence, while acknowledging that there are examples to the contrary in case law and diverging opinions in the literature, stipulates that the possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized.

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the strategic uses of foreign and international law by national courts", *American Journal of International Law*, vol. 102 (2008), pp. 241–274.

[278] United Kingdom, Supreme Court, *R (Adams) v. Secretary of State for Justice* [2011] UKSC 18, para. 17 (Lord Philips) ("[t]his practice on the part of only one of the many signatories to the ICCPR does not provide a guide to the meaning of article 14 (6) .... It has not been suggested that there is any consistency of practice on the part of the signatories that assists in determining the meaning of article 14 (6)").

[279] United Kingdom, House of Lords, *King v. Bristow Helicopters Ltd (Scotland)* [2002] UKHL 7, at para. 81.

[280] *Ibid.*, at para. 7 (Lord Mackay): "Because I consider it important that the Warsaw Convention should have a common construction in all jurisdictions that have adopted the Convention, I attach crucial importance to the decisions of the United States Supreme Court in *Eastern Airlines Inc. v. Floyd* (1991) 499 US 530 and *El Al Israel Airlines v. Tseng*, particularly as the United States is such a large participant in carriage by air"; or Einfeld J. for the Federal Court of Australia in *Commissioner of the Australian Federal Police and the Commonwealth of Australia v. Geraldo Magno and Ines Almeida* [1992] FCA 566, in a case concerning the interpretation of the term "impairment of dignity" of a diplomatic representation under article 22 of the Vienna Convention on Diplomatic Relations, recalling article 31, paragraph 3 (b), who stated that "international application of the Convention by democratic countries indicates that another significant consideration is freedom of speech in the host country. This factor is particularly weighty when dealing with political demonstrations outside embassies. It is useful to consider the practice of countries with considerable experience in dealing with this type of situation, such as the United States and the United Kingdom", at para. 30.

[281] Canada, Supreme Court, *Yugraneft Corp. v. Rexx Management Corp.* [2010] 1 SCR 649, para. 21 (Rothstein J.).

[282] United Kingdom, House of Lords: *Sidhu v. British Airways* [1997] AC 430, at p. 453 (Lord Hope); *Fothergill v. Monarch Airlines Ltd.* [1981] AC 251, pp. 275–276 (Lord Wilberforce).

(22) Article 39 of the 1969 Vienna Convention provides: "A treaty may be amended by agreement between the parties." Article 31, paragraph 3 (a), on the other hand, refers to subsequent agreements "between the parties regarding the interpretation of the treaty and the application of its provisions", and does not seem to address the question of amendment or modification. As the WTO Appellate Body has held:

> "... the term 'application' in Article 31 (3) (a) relates to the situation where an agreement specifies how existing rules or obligations in force are to be 'applied'; the term does not connote the creation of new or the extension of existing obligations that are subject to a temporal limitation ...".[283]

(23) Articles 31, paragraph 3 (a), and 39, if read together, demonstrate that agreements that the parties reach subsequently to the conclusion of a treaty can interpret and amend or modify the treaty.[284] An agreement under article 39 need not display the same form as the treaty that it amends.[285] As the International Court of Justice has held in the *Pulp Mills on the River Uruguay* case:

> "Whatever its specific designation and in whatever instrument it may have been recorded (the [Administrative Commission of the River Uruguay] minutes), this 'understanding' is binding on the Parties, to the extent that they have consented to it and must be observed by them in good faith. They are entitled to depart from the procedures laid down by the 1975 Statute, in respect of a given project pursuant to an appropriate bilateral agreement."[286]

(24) It may sometimes be difficult to draw a distinction between agreements of the parties under a specific treaty provision that attributes binding force to subsequent agreements, simple subsequent agreements under article 31, paragraph 3 (a), which are not binding as such, and, finally, agreements on the amendment or modification of a treaty under articles 39 to 41.[287] There do not seem to be any formal criteria other than those set forth in article 39, if applicable, apart from the ones that may be provided for in the applicable treaty itself, which are recognized as distinguishing these different forms of subsequent agreements. It is clear, however, that States and international courts are generally prepared to accord parties a rather wide scope for the interpretation of a treaty by way of a subsequent agreement. This scope may even go beyond the ordinary meaning of the terms of the treaty. The recognition of this scope for the interpretation of a treaty goes hand in hand with the reluctance by States and courts to recognize that an agreement relating to the application of a treaty actually has the effect of amending or modifying the treaty.[288] An agreement to modify a treaty is thus not excluded, but also not to be presumed.[289]

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[283] WTO, Appellate Body Report, *EC — Bananas III* (see footnote 53 above), paras. 391–393.

[284] Murphy, "The relevance of subsequent agreement ..." (see footnote 252 above), p. 88.

[285] Sinclair, *The Vienna Convention* ... (see footnote 6 above), p. 107 with reference to Waldock, *Official Records of the United Nations Conference on the Law of Treaties* ... (A/CONF.39/11) (see footnote 185 above), 37th meeting, 24 April 1968, p. 207, paras. 49–52; Villiger, *Commentary* ... (see footnote 23 above), p. 513, paras. 7, 9 and 11; K. Odendahl, "Article 39. General rule regarding the amendment of treaties", in Dörr and Schmalenbach, *Vienna Convention on the Law of Treaties* ... (see footnote 47 above), p. 706, para. 16.

[286] *Pulp Mills on the River Uruguay* (see footnote 8 above), pp. 62–63, paras. 128 and 131; the Court then concluded, in the case under review, that these conditions had not been fulfilled, pp. 62–66, paras. 128–142.

[287] In judicial practice, it is sometimes not necessary to determine whether an agreement has the effect of interpreting or modifying a treaty, see *Territorial Dispute* (footnote 8 above), p. 29, para. 60 ("... in the view of the Court, for the purposes of the present Judgment, there is no reason to categorize it either as confirmation or as a modification of the Declaration"); it is sometimes considered that an agreement under art. 31, para. 3 (a), can also have the effect of modifying a treaty (see Aust, *Modern Treaty Law and Practice* (see footnote 134 above), pp. 212–214 with examples.

[288] *Pulp Mills on the River Uruguay* (see footnote 8 above), p. 63, para. 131 and p. 66, para. 140; Crawford, "A consensualist interpretation of article 31 (3) ..." (see footnote 216 above), p. 32; Iran-United States Claims Tribunal, Interlocutory Award No. ITL 83-B1-FT (Counterclaim) (see footnote 148 above), p. 77, at pp. 125–126, para. 132; in diplomatic contexts outside court proceedings, States

(25) Turning to the question of whether the parties can amend or modify a treaty by a common subsequent practice, the Commission originally proposed, in its draft articles on the law of treaties, to include the following provision in the 1969 Vienna Convention, which would have explicitly recognized the possibility of a modification of treaties by subsequent practice:

> "Article 38. Modification of treaties by subsequent practice
>
> A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions."[290]

(26) This draft article gave rise to an important debate at the Vienna Conference.[291] An amendment to delete draft article 38 was put to a vote and was adopted by 53 votes to 15, with 26 abstentions. After the Vienna Conference, the question was discussed whether the rejection of draft article 38 meant that the possibility of a modification of a treaty by subsequent practice of the parties had thereby been excluded. Many writers came to the conclusion that the negotiating States simply did not wish to address this question in the 1969 Vienna Convention and that treaties can, as a general rule under the customary law of treaties, indeed be modified by subsequent practice that establishes the agreement of the parties to that effect.[292] International courts and tribunals, on the other hand, have since the adoption of the 1969 Vienna Convention mostly refrained from recognizing this possibility.

(27) In the case concerning the *Dispute regarding Navigational and Related Rights*, the International Court of Justice has held that "subsequent practice of the parties, within the meaning of Article 31, paragraph 3 (b), of the Vienna Convention, can result in a departure from the original intent on the basis of a tacit agreement".[293] It is not entirely clear whether the Court thereby wanted to recognize that subsequent practice under article 31, paragraph 3 (b), may also have the effect of amending or modifying a treaty, or whether it was merely making a point relating to the interpretation of treaties, as the "original" intent of the parties is not necessarily conclusive for the interpretation of a treaty. Indeed, the Commission recognizes in draft conclusion 8 that subsequent agreements and subsequent practice, like

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tend to acknowledge more openly that a certain agreement or common practice amounts to a modification of a treaty, see Murphy, "The relevance of subsequent agreement …" (footnote 252 above), p. 83.

[289] *Pulp Mills on the River Uruguay* (see footnote 8 above), p. 66, para. 140; Crawford, "A consensualist interpretation of article 31 (3) …" (see footnote 216 above), p. 32.

[290] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 236 (footnote omitted).

[291] See *Official Records of the United Nations Conference on the Law of Treaties* … (A/CONF.39/11) (footnote 185 above), 37th meeting, 24 April 1968, pp. 207–215; A/CN.4/671, paras. 119–121; Distefano, "La pratique subséquente …" (footnote 183 above), pp. 56–61.

[292] Sinclair, *The Vienna Convention* … (see footnote 6 above), p. 138; Gardiner, *Treaty Interpretation* (see footnote 5 above), pp. 275–280; Yasseen, "L'interprétation des traités…" (see footnote 6 above), pp. 51–52; Kamto, "La volonté de l'État …" (see footnote 146 above), pp. 134–141, at p. 134; Aust, *Modern Treaty Law and Practice* (see footnote 134 above), p. 213; Villiger, *Commentary* … (see footnote 23 above), p. 432, para. 23; Dörr, "Article 31 …" (see footnote 47 above), pp. 595–596, para. 77 (in accord, Odendahl, "Article 39 …" (see footnote 285 above), p. 702, paras. 10–11); Distefano, "La pratique subséquente …" (see footnote 183 above), pp. 62–67; H. Thirlway, "The law and procedure of the International Court of Justice 1960–1989: supplement, 2006 — part three", *British Yearbook of International Law 2006*, vol. 77, pp. 1–82, p. 65; M.N. Shaw, *International Law*, 7th edition (Cambridge, United Kingdom, Cambridge University Press, 2014), p. 677; I. Buga, "Subsequent practice and treaty modification", in *Conceptual and Contextual Perspectives on the Modern Law of Treaties*, M.J. Bowman and D. Kritsiotis, eds. (forthcoming), footnote 60 with further references; disagreeing with this view, in particular, and stressing the solemnity of the conclusion of a treaty in contrast to the informality of practice Murphy, "The relevance of subsequent agreement …" (see footnote 252 above), pp. 89–90; see also Hafner, "Subsequent agreements and practice …" (see footnote 265 above), pp. 115–117 (differentiating between the perspectives of courts and States, as well as emphasizing the importance of amendment provisions in this context).

[293] *Dispute regarding Navigational and Related Rights* (see footnote 8 above), p. 242, para. 64; see also *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France* (footnote 145 above); Yasseen, "L'interprétation des traités …" (see footnote 6 above), p. 51; Kamto, "La volonté de l'État …" (see footnote 146 above), pp. 134–141; R. Bernhardt, *Die Auslegung völkerrechtlicher Verträge* (Cologne, Berlin, Heymanns, 1963), p. 132.

other means of interpretation, "may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time".[294] The scope for "interpretation" is therefore not necessarily determined by a fixed "original intent", but must rather be determined by taking into account a broader range of considerations, including certain later developments. This somewhat ambiguous dictum of the Court raises the question of how far subsequent practice under article 31, paragraph 3 (b), can contribute to "interpretation" and whether subsequent practice may have the effect of amending or modifying a treaty. Indeed, the dividing line between the interpretation and the amendment or modification of a treaty is in practice sometimes "difficult, if not impossible, to fix".[295]

(28) Apart from raising the question in its dictum in *Dispute regarding Navigational and Related Rights*,[296] the International Court of Justice has not explicitly recognized that a particular subsequent practice has had the effect of modifying a treaty. This is true, in particular, for the *Namibia* Advisory Opinion as well as for the *Wall* Advisory Opinion, in which the Court recognized that subsequent practice had an important effect on the determination of the meaning of the treaty, but stopped short of explicitly recognizing that such practice had led to an amendment or modification of the treaty.[297] Since these opinions concerned treaties establishing an international organization it seems difficult to derive a general rule of the law of treaties from them. The questions of subsequent agreements and subsequent practice relating to constituent instruments of international organizations are addressed in draft conclusion 12.[298]

(29) Other important cases in which the International Court of Justice has raised the issue of possible modification by the subsequent practice of the parties concern boundary treaties. As the Court said in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*:

> "Hence the conduct of Cameroon in that territory has pertinence only for the question of whether it acquiesced in the establishment of a change in treaty title, which cannot be wholly precluded as a possibility in law … ."[299]

(30) The Court found such acquiescence in the case concerning the *Temple of Preah Vihear*, where it placed decisive emphasis on the fact that there had been clear assertions of sovereignty by one side (France), which, according to the Court, required a reaction on the part of the other side (Thailand).[300] This judgment, however, was rendered before the adoption of the Vienna Convention and thus, at least implicitly, was taken into account by

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[294] See draft conclusion 8 and commentary thereto, paras. (1)–(18).

[295] Sinclair, *The Vienna Convention* ... (see footnote 6 above), p. 138; Gardiner, *Treaty Interpretation* (see footnote 5 above), p. 275; Murphy, "The relevance of subsequent agreement …" (see footnote 252 above), p. 90; B. Simma, "Miscellaneous thoughts on subsequent agreements and practice", in Nolte, *Treaties and Subsequent Practice* (see footnote 11 above), p. 46; Karl, *Vertrag und spätere Praxis* ... (see footnote 62 above), pp. 42–43; Sorel and Boré Eveno, "1969 Vienna Convention, Article 31 …" (see footnote 48 above), p. 825, para. 42; Dörr, "Article 31 …" (see footnote 47 above), pp. 595–596, para. 77; this is true even if the two processes can theoretically be seen as being "legally quite distinct", see the Dissenting Opinion of Judge Parra-Aranguren in *Kasikili/Sedudu Island* (footnote 8 above), pp. 1212–1213, para. 16; similarly, Hafner, "Subsequent agreements and practice …" (see footnote 265 above), p. 114; Linderfalk, *On the Interpretation of Treaties* (see footnote 54 above), p. 168.

[296] *Dispute regarding Navigational and Related Rights* (see footnote 8 above), p. 242, para. 64.

[297] Thirlway, "The law and procedure of the International Court of Justice 1960–1989 …" (see footnote 292 above), p. 64.

[298] See already *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10*, A/67/10, p. 124, para. 238, and, *ibid., Sixty-third Session, Supplement No. 10*, A/63/10, annex A, para. 42.

[299] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303, at p. 353, para. 68.

[300] *Case concerning the Temple of Preah Vihear* (see footnote 97 above): "an acknowledgement by conduct was undoubtedly made in a very definite way … it is clear that the circumstances were such as called for some reaction" (p. 23); "[a] clearer affirmation of title on the French Indo-Chinese side can scarcely be imagined" and therefore "demanded a reaction" (p. 30).

States in their debate at the Vienna Conference.[301] The judgment also stops short of explicitly recognizing the modification of a treaty by subsequent practice as the Court left open whether the line on the French map was compatible with the watershed line that had been agreed upon in the original boundary treaty between the two States — although it is often assumed that this was not the case.[302]

(31) Thus, while leaving open the possibility that a treaty might be modified by the subsequent practice of the parties, the International Court of Justice has so far not explicitly recognized that such an effect has actually been produced in a specific case. Rather, the Court has reached interpretations that were difficult to reconcile with the ordinary meaning of the text of the treaty, but which were in line with the identified practice of the parties.[303] Contrary holdings by arbitral tribunals have been characterized either as an "isolated exception"[304] or rendered before the Vienna Conference and critically referred to there.[305]

(32) The WTO Appellate Body has made clear that it would not accept an interpretation that would result in a modification of a treaty obligation, as this would not be an "application" of an existing treaty provision.[306] The Appellate Body's position may be influenced by article 3, paragraph 2, of the Understanding on Rules and Procedures Governing the Settlement of Disputes, according to which: "Recommendations and rulings of the [Dispute Settlement Body] cannot add to or diminish the rights and obligations provided in the covered agreements."[307]

(33) The European Court of Human Rights has occasionally recognized the subsequent practice of the parties as a possible source for a modification of the Convention. In an *obiter dictum* in the 1989 case of *Soering v. the United Kingdom*, the Court held:

> " … that an established practice within the member States could give rise to an amendment of the Convention. In that case the Court accepted that subsequent

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[301] M. Kohen, "*Uti possidetis*, prescription et pratique subséquente à un traité dans l'affaire de l'île de Kasikili/Sedudu devant la Cour internationale de Justice", *German Yearbook of International Law*, vol. 43 (2000), p. 253, at p. 272.

[302] *Case concerning the Temple of Preah Vihear* (see footnote 97 above), p. 26: "a fact, which if true, must have been no less evident in 1908". Judge Parra-Aranguren has opined that the *Temple of Preah Vihear* case demonstrated "that the effect of subsequent practice on that occasion was to amend the treaty" (see *Kasikili/Sedudu Island* (footnote 8 above), Dissenting Opinion of Judge Parra-Aranguren, pp. 1212–1213, para. 16); Buga, "Subsequent practice and treaty modification" (see footnote 292 above), footnote 109.

[303] In particular the Namibia opinion (see footnote 246 above) has been read as implying that subsequent practice has modified Article 27, paragraph 3, of the Charter of the United Nations, see Alain Pellet, "Article 38", in *The Statute of the International Court of Justice A Commentary*, 2nd edition, A. Zimmermann and others, eds. (Oxford, Oxford University Press, 2012), p. 844, para. 279, note 809; *cf.* A/CN.4/671, paras. 124–126.

[304] M. Kohen, "Keeping subsequent agreements and practice in their right limits", in Nolte, *Treaties and Subsequent Practice* (see footnote 11 above), pp. 34 *et seq.*, at p. 43 regarding *Decision regarding delimitation of the border between Eritrea and Ethiopia*, 13 April 2002, UNRIAA, vol. XXV (Sales No. E/F.05.V.5), pp. 83–195, at pp. 110–111, paras. 3.6–3.10; see also *Case concerning the location of boundary markers in Taba between Egypt and Israel*, 29 September 1988, UNRIAA, vol. XX (Sales No. E/F.93.V.3), pp. 1–118, see pp. 56–57, paras. 209–210, in which the Arbitral Tribunal held, in an *obiter dictum*, "that the demarcated boundary line would prevail over the Agreement if a contradiction could be detected" (*ibid.*, p. 57); but see R. Kolb, "La modification d'un traité par la pratique subséquente des parties", *Revue suisse de droit international et de droit européen*, vol. 14 (2004), pp. 9–32, at p. 20.

[305] *Interpretation of the Air Transport Services Agreement between the United States of America and France*, 22 December 1963, UNRIAA, vol. XVI (Sales No. E/F.69.V.1), pp. 5–74, at pp. 62–63; *Official Records of the United Nations Conference on the Law of Treaties* … (A/CONF.39/11) (see footnote 185 above), 37th meeting, 24 April 1968, p. 208, para. 58 (Japan); Murphy, "The relevance of subsequent agreement …" (footnote 252 above), p. 89.

[306] WTO, Appellate Body Report, *EC — Bananas III* (see footnote 53 above), Second Recourse to Article 21.5, WT/DS27/AB/RW2/ECU and Corr.1 adopted 11 December 2008, WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008, paras. 391–393.

[307] Marrakesh Agreement establishing the World Trade Organization (see footnote 53 above), Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2, at p. 401.

> practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2 § 1 and hence remove a textual limit on the scope for evolutive interpretation of Article 3 (*ibid.*, pp. 40-41, § 103)."[308]

(34) Applying this reasoning, the Court came to the following conclusion in *Al-Saadoon and Mufdhi v. the United Kingdom*:

> "All but two of the member States have now signed Protocol No. 13 and all but three of the States which have signed have ratified it. These figures, together with consistent State practice in observing the moratorium on capital punishment, are strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances. Against this background, the Court does not consider that the wording of the second sentence of Article 2 § 1 continues to act as a bar to its interpreting the words 'inhuman or degrading treatment or punishment' in Article 3 as including the death penalty (compare *Soering*, cited above, §§ 102-04)."[309]

(35) The case law of international courts and tribunals allows the following conclusions: the WTO context suggests that a treaty may preclude the subsequent practice of the parties from having a modifying effect. Conversely, the European Court of Human Rights cases suggest that a treaty may permit the subsequent practice of the parties to have a modifying effect. Thus, ultimately, the treaty itself governs the question in the first place and much depends on the treaty or on the treaty provisions concerned.[310]

(36) The situation is more complicated in the case of treaties for which such indications do not exist. No clear residual rule for such cases can be discerned from the jurisprudence of the International Court of Justice. The conclusion can be drawn, however, that the Court, while finding that the possibility of a modification of a treaty by subsequent practice of the parties "cannot be wholly precluded as a possibility in law",[311] considered that finding such a modification should be avoided, if at all possible. Instead, the Court prefers to accept broad interpretations that may stretch the ordinary meaning of the terms of the treaty.

(37) This conclusion from the jurisprudence of the International Court of Justice is in line with certain considerations that were articulated during the debates among States on draft article 38 of the 1969 Vienna Convention.[312] Today, the consideration that amendment procedures that are provided for in a treaty are not to be circumvented by informal means seems to have gained more weight in relation to the equally true general observation that international law is often not as formalist as national law.[313] The concern that was expressed by a number of States at the Vienna Conference, according to which the possibility of modifying a treaty by subsequent practice could create difficulties for domestic constitutional law, has also since gained in relevance.[314] And, while the principle *pacta sunt*

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[308] See *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, 4 October 2010, para. 119, referring to *Öcalan v. Turkey* [GC], no. 46221/99, 12 May 2005, ECHR 2005-IV, and quoting *Soering v. the United Kingdom*, no. 14038/88, 7 July 1989, ECHR Series A no. 161.

[309] *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, 4 October 2010, para. 120; B. Malkani, "The obligation to refrain from assisting the use of the death penalty", *International and Comparative Law Quarterly*, vol. 62, No. 3 (2013), pp. 523–556; confirmed in *Hassan v. United Kingdom* [GC] (see footnote 12 above), para. 101.

[310] See Buga, "Subsequent practice and treaty modification" (footnote 292 above), footnotes 126–132.

[311] See *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303, at p. 353, para. 68.

[312] A/CN.4/671, paras. 119–121.

[313] Murphy, "The relevance of subsequent agreement and subsequent practice …" (footnote 252 above), p. 89; Simma, "Miscellaneous thoughts on subsequent agreements …" (footnote 295 above), p. 47; Hafner, "Subsequent agreements and practice …" (see footnote 265 above), pp. 115–117; J.E. Alvarez, "Limits of change by way of subsequent agreements and practice", in Nolte, *Treaties and Subsequent Practice* (see footnote 11 above), p. 130.

[314] See *NATO Strategic Concept Case*, German Federal Constitutional Court, Judgment of 19 June 2001, Application 2 BvE 6/99 (English translation available from www.bundesverfassungsgericht.de/entscheidungen/es20011122_2bve000699en.html), paras. 19–21;

servanda is not formally called into question by an amendment or modification of a treaty by subsequent practice that establishes the agreement of all the parties, it is equally true that the stability of treaty relations may be called into question if an informal means of identifying agreement as subsequent practice could easily modify a treaty.[315]

(38) In conclusion, while there exists some support in international case law that, absent indications in the treaty to the contrary, the agreed subsequent practice of the parties theoretically may lead to modifications of a treaty, the actual occurrence of that effect is not to be presumed. Instead, States and courts prefer to make every effort to conceive of an agreed subsequent practice of the parties as an effort to interpret the treaty in a particular way. Such efforts to interpret a treaty broadly are possible since article 31 of the 1969 Vienna Convention does not accord primacy to one particular means of interpretation contained therein, but rather requires the interpreter to take into account all means of interpretation as appropriate.[316] In this context an important consideration is how far an evolutive interpretation of the treaty provision concerned is possible.[317]

Conclusion 8
Interpretation of treaty terms as capable of evolving over time

Subsequent agreements and subsequent practice under articles 31 and 32 may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time.

Commentary

(1) Draft conclusion 8 addresses the role that subsequent agreements and subsequent practice may play in the context of the more general question of whether the meaning of a term of a treaty is capable of evolving over time.

(2) In the case of treaties, the question of the so-called intertemporal law[318] has traditionally been put in terms of whether a treaty should be interpreted in the light of the

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German Federal Fiscal Court, BFHE, vol. 157, p. 39, at pp. 43–44; *ibid.*, vol. 227, p. 419, at p. 426; *ibid.*, vol. 181, p. 158, at p. 161; S. Kadelbach, "Domestic constitutional concerns with respect to the use of subsequent agreements and practice at the international level", in Nolte, *Treaties and Subsequent Practice* (see footnote 11 above), pp. 145–148; Alvarez, "Limits of change …" (see footnote 313 above), p. 130; I. Wuerth, "Treaty interpretation, subsequent agreements and practice, and domestic constitutions", in Nolte, *Treaties and Subsequent Practice* (see footnote 11 above), pp. 154–159; and H. Ruiz Fabri, "Subsequent practice, domestic separation of powers, and concerns of legitimacy", in Nolte, *Treaties and Subsequent Practice* (see footnote 11 above), pp. 165–166.

[315] See, for example, Kohen, "*Uti possidetis*, prescription et pratique subséquente …" (footnote 301 above), p. 274 (in particular with respect to boundary treaties).

[316] See above draft conclusion 2, para. 5, and the commentary thereto; Hafner, "Subsequent agreements and practice …" (see footnote 265 above), p. 117; some authors support the view that the range of what is conceivable as an "interpretation" is wider in case of a subsequent agreement or subsequent practice under article 31, paragraph 3, than in the case of interpretations by other means of interpretation, including the range for evolutive interpretations by courts or tribunals, for example, Gardiner, *Treaty Interpretation* (see footnote 5 above), p. 275; Dörr, "Article 31 …" (see footnote 47 above), pp. 595–596, para. 77.

[317] See draft conclusion 8; in the case concerning the *Dispute regarding Navigational and Related Rights*, for example, the International Court of Justice could leave the question open as to whether the term "comercio" had been modified by the subsequent practice of the parties since it decided that it was possible to give this term an evolutive interpretation. *Dispute regarding Navigational and Related Rights* (see footnote 8 above), pp. 242–243, paras. 64–66.

[318] T.O. Elias, "The doctrine of intertemporal law", *American Journal of International Law*, vol. 74 (1980), pp. 285 *et seq.*; D.W. Greig, *Intertemporality and the Law of Treaties* (London, British Institute of International and Comparative Law, 2001); M. Fitzmaurice, "Dynamic (evolutive) interpretation of treaties, Part I", *The Hague Yearbook of International Law*, vol. 21 (2008), pp. 101–153; M. Kotzur, "Intertemporal law", in *Max Planck Encyclopedia of Public International Law* (www.mpepil.com); U. Linderfalk, "Doing the right thing for the right reason: why dynamic or static approaches should be taken in the interpretation of treaties", *International Community Law Review*,

circumstances and the law at the time of its conclusion ("contemporaneous" or "static" interpretation), or in the light of the circumstances and the law at the time of its application ("evolutive", "evolutionary", or "dynamic" interpretation).[319] Arbitrator Max Huber's dictum in the *Island of Palmas* case according to which "a judicial fact must be appreciated in the light of the law contemporary with it"[320] led many international courts and tribunals, as well as many writers, to generally favour contemporaneous interpretation.[321] At the same time, the Arbitral Tribunal in the *Iron Rhine* case asserted that there was, "general support among the leading writers today for evolutive interpretation of treaties".[322]

(3) The Commission, in its commentary on the draft articles on the law of treaties, considered in 1966 that "to attempt to formulate a rule covering comprehensively the temporal element would present difficulties" and it, therefore, "concluded that it should omit the temporal element".[323] Similarly, the debates within the Commission's Study Group on fragmentation led to the conclusion in 2006 that it is difficult to formulate and to agree on a general rule that would give preference either to a "principle of contemporaneous interpretation" or to one that generally recognizes the need to take account of an "evolving meaning" of treaties.[324]

(4) Draft conclusion 8 should not be read as taking any position regarding the appropriateness of a more contemporaneous or a more evolutive approach to treaty interpretation in general. Draft conclusion 8 rather emphasizes that subsequent agreements and subsequent practice, as any other means of treaty interpretation, can support both a contemporaneous and an evolutive interpretation (or, as it is often called, evolutionary interpretation), where appropriate. The Commission, therefore, concluded that these means of treaty interpretation "may assist in determining whether or not" an evolutive interpretation is appropriate with regard to a particular treaty term.

(5) This approach is confirmed by the jurisprudence of international courts and tribunals. The various international courts and tribunals that have engaged in evolutive interpretation — albeit in varying degrees — appear to have followed a case-by-case approach in determining, through recourse to the various means of treaty interpretation that are referred to in articles 31 and 32, whether or not a treaty term should be given a meaning capable of evolving over time.

(6) The International Court of Justice, in particular, is seen as having developed two strands of jurisprudence, one tending towards a more "contemporaneous" and the other towards a more "evolutionary" interpretation, as Judge *ad hoc* Guillaume has pointed out in his Declaration in *Dispute regarding Navigational and Related Rights*.[325] The decisions that

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vol. 10, No. 2 (2008), pp. 109 *et seq.*; A. Verdross and B. Simma, *Universelles Völkerrecht*, 3rd edition (Berlin, Duncker & Humblot, 1984), pp. 496 *et seq.*, paras. 782 *et seq.*

[319] M. Fitzmaurice, "Dynamic (evolutive) interpretation …" (see footnote 318 above).

[320] *Island of Palmas* case *(the Netherlands/United States of America)*, award of 4 April 1928, UNRIAA, vol. II (Sales No. 1949.V.1), pp. 829–871, at p. 845.

[321] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, pp. 220–221, para. (11).

[322] *Award in Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway* (see footnote 10 above), p. 35, at para. 81; see, for example, A. Aust, *Modern Treaty Law and Practice* (see footnote 134 above), pp. 215–216; M. Fitzmaurice, "Dynamic (evolutive) interpretation …" (see footnote 318 above), pp. 29–31; G. Distefano, "L'interprétation évolutive de la norme internationale", *Revue générale de droit international public*, vol. 115, No. 2 (2011), pp. 373–396, at pp. 384 and 389 *et seq.*; Higgins, "Some observations on the inter-temporal rule …" (see footnote 246 above), pp. 174 *et seq.*; Sorel and Boré Eveno, "1969 Vienna Convention, Article 31 …" (see footnote 48 above), p. 807, para. 8; P.-M. Dupuy, "Evolutionary interpretation of treaties", in Cannizzaro, *The Law of Treaties …* (see footnote 47 above), pp. 125 *et seq.*; M. Kotzur, "Intertemporal Law" (see footnote 318 above), para. 14.

[323] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 222, para. (16); Higgins, "Some observations on the inter-temporal rule …" (see footnote 246 above), p. 178.

[324] Report of the Study Group on fragmentation of international law, 2006 (A/CN.4/L.682 and Corr.1), para. 478.

[325] *Dispute regarding Navigational and Related Rights* (see footnote 8 above), Declaration of Judge *ad hoc* Guillaume, p. 290, at pp. 294 *et seq.*, paras. 9 *et seq.*; see also *Yearbook … 2005*, vol. II (Part Two), p. 89, para. 479; Report of the Study Group on fragmentation of international law (A/CN.4/L.682 and Corr.1), para. 478; Institut de droit international, resolution on "Le problème

favour a more contemporaneous approach mostly concern specific treaty terms ("water-parting";[326] "main channel or Thalweg";[327] names of places;[328] and "mouth" of a river[329]). On the other hand, the cases that support an evolutive interpretation seem to relate to more general terms. This is true, in particular, for terms that are by definition evolutionary, such as "the strenuous conditions of the modern world" or "the well-being and development of such peoples" in article 22 of the Covenant of the League of Nations. The International Court of Justice, in its *Namibia* Opinion, has given those terms an evolving meaning by referring to the evolution of the right of peoples to self-determination after the Second World War.[330] The "generic" nature of a particular term in a treaty[331] and the fact that the treaty is designed to be "of continuing duration"[332] may also give rise to an evolving meaning.

(7) Other international judicial bodies sometimes also employ an evolutive approach to interpretation, though displaying different degrees of openness towards such interpretation. The WTO Appellate Body has only occasionally resorted to evolutive interpretation. In a well-known case it has, however, held that "the generic term 'natural resources' in article XX(g) is not 'static' in its content or reference but is rather 'by definition, evolutionary'".[333] The ITLOS Seabed Disputes Chamber has held that the meaning of certain obligations to ensure[334] "may change over time",[335] and has emphasized that the rules of State liability in the United Nations Convention on the Law of the Sea are apt to follow developments in the law and are "not considered to be static".[336] The European Court of Human Rights has held more generally "that the Convention is a living instrument which … must be interpreted in the light of present-day conditions".[337] The Inter-American Court of Human Rights also more generally follows an evolutive approach to interpretation, in particular in connection with its so-called *pro homine* approach.[338] In the *Iron Rhine* case, the continued viability

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intertemporel en droit international public", *Annuaire de l'Institut de droit international*, vol. 56 (Wiesbaden session, 1975), pp. 536 *et seq.* (www.idi-iil.org).

[326] *Case concerning a boundary dispute between Argentina and Chile concerning the delimitation of the frontier line between boundary post 62 and Mount Fitzroy*, decision of 21 October 1994, UNRIAA, vol. XXII (Sales No. E/F.00.V.7), pp. 3–149, at p. 43, para. 130; see also, with respect to the term "watershed", *Case concerning the Temple of Preah Vihear* (see footnote 97 above), pp. 16–22.

[327] *Kasikili/Sedudu Island* (see footnote 8 above), pp. 1060–1062, paras. 21 and 25.

[328] *Decision regarding delimitation of the border between Eritrea and Ethiopia (Eritrea v. Ethiopia)*, UNRIAA, vol. XXV (Sales No. E/F.05.V.5), pp. 83–195, p. 110, para. 3.5.

[329] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303, at p. 338 and 339, para. 48, and p. 346, para. 59.

[330] *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (see footnote 40 above), p. 31, para. 53.

[331] *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 3, at p. 32, para. 77; Report of the Study Group on fragmentation of international law, 2006 (A/CN.4/L.682 and Corr.1), para. 478.

[332] *Dispute regarding Navigational and Related Rights* (see footnote 8 above), p. 243, para. 66.

[333] WTO Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products* (*US — Shrimp*), WT/DS58/AB/R, adopted 6 November 1998, para. 130.

[334] See United Nations Convention on the Law of the Sea, 1982, United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3, art. 153, para. 4, and art. 4, para. 4 in annex III.

[335] *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the area* (see footnote 9 above), para. 117.

[336] *Ibid.*, para. 211.

[337] *Tyrer v. the United Kingdom*, no. 5856/72, ECHR Series A, no. 26, para. 31; *Güzelyurtlu and Others v. Cyprus and Turkey*, no. 36925/07, 4 April 2017, para. 286; *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, ECHR 2016 (extracts), paras. 138 and 150; *Biao v. Denmark* [GC], no. 38590/10, 24 May 2016, para. 131.

[338] *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (see footnote 39 above), para. 114 ("This guidance is particularly relevant in the case of international human rights law, which has made great headway thanks to an evolutive interpretation of international instruments of protection. That evolutive interpretation is consistent with the general rules of treaty interpretation established in the 1969 Vienna Convention. Both this Court, in the Advisory Opinion on the Interpretation of the American Declaration of the Rights and Duties of Man (1989) and the European Court of Human Rights, in *Tyrer v. United Kingdom* (1978),

and effectiveness of a multidimensional cross-border railway arrangement was an important reason for the Arbitral Tribunal to accept that even rather technical rules may have to be given an evolutive interpretation.[339]

(8) In the final analysis, most international courts and tribunals have not recognized evolutive interpretation as a separate form of interpretation, but instead have arrived at such an evolutive interpretation in application of the various means of interpretation that are mentioned in articles 31 and 32 of the 1969 Vienna Convention, by considering certain criteria (in particular those mentioned in paragraph (6) above) on a case-by-case basis. Any evolutive interpretation of the meaning of a term over time must therefore result from the ordinary process of treaty interpretation.[340]

(9) The Commission considers that this state of affairs confirms its original approach to treaty interpretation:

> "… the Commission's approach to treaty interpretation was on the basis that the text of the treaty must be presumed to be the authentic expression of the intentions of the parties, and that the elucidation of the meaning of the text rather than an investigation *ab initio* of the supposed intentions of the parties constitutes the object of interpretation … making the ordinary meaning of the terms, the context of the treaty, its object and purpose, and the general rules of international law, together with authentic interpretations by the parties, the primary criteria for interpreting a treaty".[341]

Accordingly, draft conclusion 8, by using the phrase "presumed intention", refers to the intention of the parties as determined through the application of the various means of interpretation that are recognized in articles 31 and 32. The "presumed intention" is thus not a separately identifiable original will, and the *travaux préparatoires* are not the primary basis for determining the presumed intention of the parties, but they are only, as article 32 indicates, a supplementary means of interpretation. And although interpretation must seek to identify the intention of the parties, this must be done by the interpreter on the basis of the means of interpretation that are available at the time of the act of interpretation and that include subsequent agreements and subsequent practice of parties to the treaty. The interpreter thus has to answer the question of whether parties can be presumed to have intended, upon the conclusion of the treaty, to give a term used a meaning that is capable of evolving over time.

(10) Draft conclusion 8 does not take a position regarding the question of the appropriateness of a more contemporaneous or a more evolutive approach to treaty interpretation in general (see above commentary, at paragraph (4)). The conclusion should, however, be understood as indicating the need for some caution with regard to arriving at a

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Marckx v. Belgium (1979), *Loizidou v. Turkey* (1995), among others, have held that human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions") (footnotes omitted); Arévalo Narváez and Patarroyo Ramirez, "Treaties over Time and Human Rights …" (see footnote 13 above), pp. 295–331.

[339] See *Arbitration regarding the Iron Rhine* (see footnote 10 above), para. 80: "In the present case it is not a conceptual or generic term that is in issue, but rather new technical developments relating to the operation and capacity of the railway"; and also *Aegean Sea Continental Shelf* case (see footnote 331 above), p. 32, para. 77; *Case concerning the delimitation of the maritime boundary between Guinea-Bissau and Senegal (Guinea-Bissau v. Senegal)*, Award, 31 July 1989, UNRIAA, vol. XX (Sales No. E.93.V.3), pp. 119–213, at pp. 151–152, para. 85.

[340] As the Study Group on fragmentation of international law has phrased it in its 2006 report, "[t]he starting-point must be … the fact that deciding [the] issue [of evolutive interpretation] is a matter of interpreting the treaty itself" (see A/CN.4/L.682 and Corr.1, para. 478).

[341] *Yearbook … 1964*, vol. II, document A/5809, pp. 204–205, para. (15); see also para. (13), "[p]aragraph 3 specifies as further authentic elements of interpretation: (*a*) agreements between the parties regarding the interpretation of the treaty, and (*b*) any subsequent practice in the application of the treaty which clearly established the understanding of all the parties regarding its interpretation" (*ibid.*, pp. 203–204); on the other hand, Waldock in his third report on the law of treaties explained that *travaux préparatoires* are not, as such, an authentic means of interpretation (*ibid.*, document A/CN.4/167 and Add.1-3, pp. 58–59, para. (21)).

conclusion in a specific case whether to adopt an evolutive approach. For this purpose, draft conclusion 8 points to subsequent agreements and subsequent practice as means of interpretation that may provide useful indications to the interpreter for assessing, as part of the ordinary process of treaty interpretation, whether the meaning of a term is capable of evolving over time.[342]

(11) This approach is based on and confirmed by the jurisprudence of the International Court of Justice and other international courts and tribunals. In the *Namibia* Advisory Opinion, the International Court of Justice referred to the practice of United Nations organs and of States in order to specify the conclusions that it derived from the inherently evolutive nature of the right to self-determination.[343] In the *Aegean Sea* case, the Court found it "significant" that what it had identified as the "ordinary, generic sense" of the term "territorial status" was confirmed by the administrative practice of the United Nations and by the behaviour of the party that had invoked the restrictive interpretation in a different context.[344] In any case, the decisions in which the International Court of Justice has undertaken an evolutive interpretation have not strayed from the possible meaning of the text and from the presumed intention of the parties to the treaty, as they had also been expressed in their subsequent agreements and subsequent practice.[345]

(12) The judgment of the International Court of Justice in *Dispute regarding Navigational and Related Rights* illustrates how subsequent agreements and subsequent practice of the parties can assist in determining whether a term has to be given a meaning that is capable of evolving over time. Interpreting the term "comercio" in a treaty of 1858, the Court held:

> "On the one hand, the subsequent practice of the parties, within the meaning of article 31 (3) (b) of the Vienna Convention, can result in a departure from the original intent on the basis of a tacit agreement between the parties. On the other hand, there are situations in which the parties' intent upon conclusion of the treaty was … to give the terms used … a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law."[346]

The Court then found that the term "comercio" was a "generic term" of which "the parties necessarily" had "been aware that the meaning … was likely to evolve over time" and that "the treaty has been entered into for a very long period", and concluded that "the parties must be presumed … to have intended" this term to "have an evolving meaning".[347] Judge Skotnikov, in a Separate Opinion, while disagreeing with this reasoning, ultimately arrived at the same result by accepting that a more recent subsequent practice of Costa Rica related to tourism on the San Juan River "for at least a decade" against which Nicaragua "never protested" but rather "engaged in consistent practice of allowing tourist navigation" and concluded that this "suggests that the parties have established an agreement regarding its interpretation".[348]

(13) The International Criminal Tribunal for the former Yugoslavia has sometimes taken more general forms of State practice into account, including trends in the legislation of States that, in turn, can give rise to a changed interpretation of the scope of crimes or their

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[342] See also Gardiner, *Treaty Interpretation* (above footnote 5), pp. 292–294; R. Kolb, *Interprétation et création du droit international* (see footnote 133 above), pp. 488–501; J. Arato, "Subsequent practice and evolutive interpretation", *The Law & Practice of International Courts and Tribunals*, vol. 9–3 (2010), pp. 443–494, at pp. 444–445, 465 *et seq*.

[343] *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (see footnote 40 above), pp. 30–31, paras. 49–51.

[344] *Aegean Sea Continental Shelf* case (see footnote 331 above), p. 31, para. 74.

[345] See also *Case concerning the delimitation of the maritime boundary between Guinea-Bissau and Senegal* (see footnote 339 above), pp. 151–152, para. 85.

[346] *Dispute regarding Navigational and Related Rights* (see footnote 8 above), p. 242, para. 64.

[347] *Ibid.*, p. 243, paras. 66–68.

[348] *Ibid.*, Separate Opinion of Judge Skotnikov, p. 283, at p. 285, paras. 9–10.

elements. In *Prosecutor v. Furundžija*,[349] for example, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia, in search of a definition for the crime of rape as prohibited by article 27 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War,[350] article 76, paragraph 1, of the first Additional Protocol (Protocol I)[351] and article 4, paragraph 2 (e), of the second Additional Protocol (Protocol II),[352] examined the principles of criminal law common to the major legal systems of the world and held:

> "… that a trend can be discerned in the national legislation of a number of States of broadening the definition of rape so that it now embraces acts that were previously classified as comparatively less serious offences, that is sexual or indecent assault. This trend shows that at the national level States tend to take a stricter attitude towards serious forms of sexual assault …."[353]

(14) The "living instrument" approach of the European Court of Human Rights is also based, *inter alia*, on different forms of subsequent practice.[354] While the Court does not generally require "the agreement of the parties regarding its interpretation" in the sense of article 31, paragraph 3 (b), the decisions in which it adopts an evolutive approach are regularly supported by an elaborate account of subsequent practice.[355]

(15) The Inter-American Court of Human Rights, despite its relatively rare mentioning of subsequent practice, has frequently referred to broader international developments, an approach that falls somewhere between subsequent practice and other "relevant rules" under article 31, paragraph 3 (c).[356] In the case of *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, for example, the Court pointed out that:

> "… human rights treaties are live instruments ["instrumentos vivos"] whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions."[357]

(16) The Human Rights Committee has also on occasion adopted an evolutive approach that is based on developments of State practice. Thus, in *Judge v. Canada*, the Committee abandoned its *Kindler*[358] jurisprudence, elaborating that:

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[349] *Prosecutor v. Anto Furundžija*, Trial Chamber, Judgment, 10 December 1998, case No. IT-95-17/1-T, ICTY *Judicial Reports 1998*, vol. I, paras. 165 *et seq*.

[350] United Nations, *Treaty Series*, vol. 75, No. 973, p. 287.

[351] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), United Nations, *Treaty Series*, vol. 1125, no. 17512, p. 3.

[352] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II), United Nations, *Treaty Series*, vol. 1125, no. 17513, p. 609.

[353] See *Prosecutor v. Anto Furundžija* (footnote 349 above), para. 179; similarly *The Prosecutor v. Alfred Musema*, International Criminal Tribunal for Rwanda, Trial Chamber I, Judgment, 27 January 2000, case No. ICTR-96-13-A, paras. 220 *et seq*., in particular para. 228.

[354] See Nolte, "Jurisprudence under special regimes …" (footnote 11 above), pp. 246 *et seq*.

[355] *Öcalan v. Turkey* [GC], no. 46221/99, 12 May 2005, ECHR 2005-IV, para. 163; *VO v. France* [GC], no. 53924/00, 8 July 2004, ECHR 2004-VIII, paras. 4 and 70; *Johnston and Others. v. Ireland*, no. 9697/82, 18 December 1986, ECHR Series A no. 112, para. 53; *Bayatyan v. Armenia* [GC], no. 23459/03, 7 July 2011, para. 63; *Soering v. the United Kingdom*, no. 14038/88, 7 July 1989, ECHR Series A no. 161, para. 103; *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, 4 October 2010, paras. 119–120, ECHR 2010 (extracts); *Demir and Baykara v. Turkey* [GC], no. 34503/97, 12 November 2008, ECHR-2008, para. 76; *Christine Goodwin v. the United Kingdom* [GC] (see footnote 171 above).

[356] See, for example, *Velásquez-Rodríguez v. Honduras*, Judgment (Merits), 29 July 1988, Inter-Am. Ct. H.R. Series C No. 4, para. 151; *The Right to Information on Consular Assistance In the Framework of the Guarantees of the Due Process of Law* (see footnote 39 above), paras. 130–133 and 137.

[357] *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment (Merits, Reparations and Costs), 31 August 2001, Series C No. 79, para. 146; also see *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion, 14 July 1989, OC-10/89, Series A No. 10, para. 38.

> "The Committee is mindful of the fact that the above-mentioned jurisprudence was established some 10 years ago, and that since that time there has been a broadening international consensus in favour of abolition of the death penalty, and in States which have retained the death penalty, a broadening consensus not to carry it out."[359]

In *Yoon and Choi*, the Committee stressed that the meaning of any right contained in the International Covenant on Civil and Political Rights[360] evolved over time and concluded that article 18, article 3, now provided at least some protection against being forced to act against genuinely held religious beliefs. The Committee reached this conclusion since "an increasing number of those States parties to the Covenant which have retained compulsory military service have introduced alternatives to compulsory military service".[361]

(17) Finally, the tribunals established under the auspices of the International Centre for the Settlement of Investment Disputes have emphasized that subsequent practice can be a particularly important means of interpretation for such provisions that the parties to the treaty intended to evolve in the light of their subsequent treaty practice. In the case of *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, for example, the Tribunal held that:

> "Neither party asserted that the ICSID Convention contains any precise *a priori* definition of '*investment*'. Rather, the definition was left to be worked out in the subsequent practice of States, thereby preserving its integrity and flexibility and allowing for future progressive development of international law on the topic of investment."[362]

(18) The jurisprudence of international courts and tribunals and the pronouncements of expert treaty bodies thus confirm that subsequent agreements and subsequent practice under articles 31 and 32 "may assist in determining" whether or not a "term" shall be given "a meaning which is capable of evolving over time". The expression "term" is not limited to specific words (like "commerce", "territorial status", "rape" or "investment"), but may also encompass more interrelated or cross-cutting concepts (such as "by law" (article 9 of the International Covenant on Civil and Political Rights) or "necessary" (article 18 of the Covenant), as they exist, for example, in human rights treaties). Since the "terms" of a treaty are elements of the rules which are contained therein, the rules concerned are covered accordingly.

(19) In a similar manner, subsequent practice under articles 31, paragraph 3 (b), and 32 has contributed to whether domestic courts arrive at a more evolutive or static interpretation of a treaty. For example, in a case concerning the Convention on the Civil Aspects of International Child Abduction,[363] the New Zealand Court of Appeal interpreted the term "custody rights" as encompassing not only legal rights, but also "*de facto* rights". On the basis of a review of legislative and judicial practice in different States and referring to article 31, paragraph 3 (b), the Court reasoned that this practice "evidence[d] a fundamental change in attitudes", which then led it to adopt a modern understanding of the term

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[358] *Kindler v. Canada*, Views, 30 July 1993, Communication No. 470/1991, Human Rights Committee report, *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40* (A/48/40), vol. II, Annex XII, U.

[359] *Judge v. Canada*, Views, 5 August 2002, Communication No. 829/1998, *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 40* (A/58/40), vol. II, annex V, G, para. 10.3.

[360] United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171.

[361] *Yoon and Choi v. the Republic of Korea*, Views, 3 November 2006, Communication Nos. 1321/2004 and 1322/2004, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40* (A/62/40), vol. II, Annex VII, V, para. 8.4.

[362] *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka* (United States/Sri Lanka BIT), Award and Concurring Opinion, 15 March 2002, ICSID Case No. ARB/00/2, *ICSID Reports*, vol. 6 (2004), pp. 308 *et seq.*, at p. 317, para. 33; similarly, *Autopista Concesionada de Venezuela, CA v. Bolivarian Republic of Venezuela*, Decision on Jurisdiction, 27 September 2001, ICSID Case No. ARB/00/5, *ibid.*, p. 419, para. 97.

[363] United Nations, *Treaty Series*, vol. 1343, No. 22514, p. 89.

"custody rights" rather than an understanding "through a 1980 lens".[364] The German Federal Constitutional Court, in a series of cases concerning the interpretation of the North Atlantic Treaty[365] in the light of the changed security context after the end of the Cold War, also held that subsequent agreements and subsequent practice under article 31, paragraph 3 (b), "could acquire significance for the meaning of the treaty" and ultimately held that this had been the case.[366]

(20) Other decisions of domestic courts have confirmed that subsequent agreements and subsequent practice under articles 31, paragraph 3, and 32 do not necessarily support evolutive interpretations of a treaty. In *Eastern Airlines, Inc. v. Floyd et al.*, for example, the United States Supreme Court was confronted with the question of whether the term "bodily injury" in article 17 of the Warsaw Convention of 1929[367] covered not only physical but also purely mental injuries. The Court, taking account of the "post-1929 conduct" and "interpretations of the signatories", emphasized that, despite some initiatives to the contrary, most parties had always continued to understand that the term covered only bodily injuries.[368]

Conclusion 9

Weight of subsequent agreements and subsequent practice as a means of interpretation

1. The weight of a subsequent agreement or subsequent practice as a means of interpretation under article 31, paragraph 3, depends, *inter alia*, on its clarity and specificity.

2. In addition, the weight of subsequent practice under article 31, paragraph 3 (b), depends, *inter alia*, on whether and how it is repeated.

3. The weight of subsequent practice as a supplementary means of interpretation under article 32 may depend on the criteria referred to in paragraphs 1 and 2.

Commentary

(1) Draft conclusion 9 identifies some criteria that may be helpful in determining the interpretative weight to be accorded to a specific subsequent agreement or subsequent practice in the process of interpretation in a particular case. Naturally, the weight accorded to subsequent agreements or subsequent practice must also be determined in relation to other means of interpretation (see draft conclusion 2, paragraph 5).

Paragraph 1 — weight: clarity, specificity and other factors

(2) Paragraph 1 addresses the weight of a subsequent agreement or subsequent practice under article 31, paragraph 3, thus dealing with both subparagraphs (a) and (b) from a general point of view. Paragraph 1 specifies that the weight to be accorded to a subsequent

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[364] New Zealand, Court of Appeal, *C v. H* [2009] NZCA 100, paras. 175–177 and 195–196 (Baragwanath J.); see also para. 31 (Chambers J.): "Revision of the text as drafted and agreed in 1980 is simply impracticable, given that any revisions would have to be agreed among such a large body of Contracting States. Therefore evolutions necessary to keep pace with social and other trends must be achieved by evolutions in interpretation and construction. This is a permissible exercise given the terms of the Vienna Convention on the Law of Treaties, which also came in force in 1980. Article 31 (3) (b) permits a construction that reflects 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'." Similarly, Canada, Supreme Court, *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982, para. 129 (Cory J.).

[365] United Nations, *Treaty Series*, vol. 34, No. 541, p. 243.

[366] Germany, Federal Constitutional Court, BVerfGE, vol. 90, p. 286, at pp. 363–364, para. 276; *ibid.*, vol. 104, p. 151, at pp. 206–207.

[367] Convention for the Unification of Certain Rules regarding International Transport, League of Nations, *Treaty Series*, vol. CXXXVII, p. 11.

[368] United States of America, Supreme Court, *Eastern Airlines, Inc. v. Floyd et al.*, 499 U.S. 530, pp. 546–549; see also United Kingdom, House of Lords, *King v. Bristow Helicopters Ltd. (Scotland)* [2002] UKHL 7, paras. 98 and 125 (Lord Hope).

agreement or subsequent practice as a means of interpretation depends, *inter alia*, on its clarity and specificity. The use of the term "*inter alia*" indicates that these criteria should not be seen as exhaustive. Other criteria may relate to the time when the agreement or practice occurred,[369] the emphasis given by the parties to a particular agreement or practice, or the applicable burden of proof.

(3) The interpretative weight of subsequent agreements or practice in relation to other means of interpretation often depends on their clarity and specificity in relation to the treaty concerned.[370] This is confirmed, for example, by decisions of the International Court of Justice, arbitral awards and reports of the WTO Panels and Appellate Body.[371] The award of the ICSID Tribunal in *Plama Consortium Limited* v. *Republic of Bulgaria* is instructive:

> "It is true that treaties between one of the Contracting Parties and third States may be taken into account for the purpose of clarifying the meaning of a treaty's text at the time it was entered into. The Claimant has provided a very clear and insightful presentation of Bulgaria's practice in relation to the conclusion of investment treaties subsequent to the conclusion of the Bulgaria-Cyprus BIT in 1987. In the 1990s, after Bulgaria's communist regime changed, it began concluding BITs with much more liberal dispute resolution provisions, including resort to ICSID arbitration. However, that practice is not particularly relevant in the present case since subsequent negotiations between Bulgaria and Cyprus indicate that these Contracting Parties did not intend the MFN provision to have the meaning that otherwise might be inferred from Bulgaria's subsequent treaty practice. Bulgaria and Cyprus negotiated a revision of their BIT in 1998. The negotiations failed but specifically contemplated a revision of the dispute settlement provisions … It can be inferred from these negotiations that the Contracting Parties to the BIT themselves did not consider that the MFN provision extends to dispute settlement provisions in other BITs."[372]

(4) Whereas the International Court of Justice and arbitral tribunals tend to accord more interpretative weight to rather specific subsequent practice by States, the European Court of Human Rights often relies on broad comparative assessments of the domestic legislation or international positions adopted by States.[373] In this latter context, it should be borne in mind that the rights and obligations under human rights treaties must be correctly transformed, within the given margin of appreciation, into the law, the executive practice and international arrangements of the respective State party. For this purpose, sufficiently strong commonalities in the national legislation of States parties can be relevant for the determination of the scope of a human right or the necessity of its restriction. In addition, the character of certain rights or obligations sometimes speaks in favour of taking less specific practice into account. For example, in the case of *Rantsev v. Cyprus*, the Court held that:

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[369] In the case concerning the *Maritime Dispute (Peru v. Chile)*, the Court privileged the practice that was closer to the date of entry into force, *Maritime Dispute (Peru v. Chile), Judgment, I.C.J. Reports 2014*, p. 3, at p. 50, para. 126.

[370] Murphy, "The relevance of subsequent agreement and subsequent practice …" (footnote 252 above), p. 91.

[371] See, for example, *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 38, at p. 55, para. 38; *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France* (see footnote 145 above), p. 231, at p. 259, para. 74; WTO Panel Report, *United States — Continued Existence and Application of Zeroing Methodology*, WT/DS350/R, adopted 19 February 2009, WTO Appellate Body Report, *United States — Subsidies on Upland Cotton (US — Upland Cotton)*, WT/DS267/AB/R, adopted 21 March 2005, para. 625.

[372] *Plama Consortium Limited* v. *Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, *ICSID Review — Foreign Investment Law Journal*, vol. 20, No. 1 (Spring 2005), p. 262, at pp. 323–324, para. 195.

[373] See, for example, *Cossey v. the United Kingdom*, no. 10843/84, 27 September 1990, ECHR Series A no. 184, para. 40; *Tyrer v. the United Kingdom*, no. 5856/72, ECHR Series A, no. 26, para. 31; *Norris v. Ireland*, no. 10581/83, 26 October 1988, ECHR Series A no. 142, para. 46.

> "It is clear from the provisions of these two [international] instruments that the Contracting States … have formed the view that only a combination of measures addressing all three aspects can be effective in the fight against trafficking … Accordingly, the duty to penalise and prosecute trafficking is only one aspect of member States' general undertaking to combat trafficking. The extent of the positive obligations arising under Article 4 [prohibition of forced labour] must be considered within this broader context."[374]

(5) On the other hand, in the case of *Chapman v. the United Kingdom*, the Court observed "that there may be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle",[375] but ultimately said that it was "not persuaded that the consensus is sufficiently concrete for it to derive any guidance as to the conduct or standards which Contracting States consider desirable in any particular situation".[376]

Paragraph 2 — weight: repetition of a practice and other factors

(6) Paragraph 2 of draft conclusion 9 deals only with subsequent practice under article 31, paragraph 3 (b), and specifies that, in addition to the criteria mentioned in paragraph 1, the weight of subsequent practice also depends, *inter alia*, on whether and how it is repeated. This formula "whether and how it is repeated" brings in the elements of time and of the character of a repetition. It indicates, for example, that, depending on the treaty concerned, something more than just a technical or unmindful repetition of a practice may contribute to its interpretative value in the context of article 31, paragraph 3 (b). The elements of time and the character of the repetition also serve to indicate the "grounding" of a particular position of the parties regarding the interpretation of a treaty. Moreover, the non-implementation of a subsequent agreement may suggest a lack of its weight as a means of interpretation under article 31, paragraph 3 (a).[377]

(7) The question of whether "subsequent practice" under article 31, paragraph 3 (b),[378] requires more than a one-off application of the treaty was addressed by the WTO Appellate Body in *Japan — Alcoholic Beverages II*:

> "… subsequent practice in interpreting a treaty has been recognized as a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties regarding its interpretation".[379]

(8) This definition suggests that subsequent practice under article 31, paragraph 3 (b), requires more than one "act or pronouncement" regarding the interpretation of a treaty; rather action of such frequency and uniformity that it warrants a conclusion that the parties have reached a settled agreement regarding the interpretation of the treaty. Such a threshold would imply that subsequent practice under article 31, paragraph 3 (b), requires a broad-based, settled and qualified form of collective practice in order to establish agreement among the parties regarding interpretation.

(9) The International Court of Justice, on the other hand, has applied article 31, paragraph 3 (b), more flexibly, without adding further conditions. This is true, in particular, for its judgment in the case of *Kasikili/Sedudu Island*.[380] Other international courts have

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[374] *Rantsev v. Cyprus and Russia*, no. 25965/04, 7 January 2010, ECHR 2010 (extracts), para. 285; see also paras. 273–274.

[375] *Chapman v. the United Kingdom* [GC], no. 27238/95, 18 January 2001, ECHR 2001-I, para. 93.

[376] *Ibid.*, para. 94.

[377] *Pulp Mills on the River Uruguay* (see footnote 8 above), p. 63, para. 131.

[378] See above draft conclusion 4, para. 2.

[379] WTO Appellate Body Report, *Japan — Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, adopted on 1 November 1996, sect. E, pp. 12–13 (footnotes omitted).

[380] *Kasikili/Sedudu Island* (see footnote 8 above), pp. 1075–1076, paras. 47–50 and p. 1087, para. 63; *Territorial Dispute* (see footnote 8 above), pp. 34–37, paras. 66–71.

mostly followed the approach of the International Court of Justice. This is true for the Iran-United States Claims Tribunal[381] and the European Court of Human Rights.[382]

(10) The difference between the standard formulated by the WTO Appellate Body, on the one hand, and the approach of the International Court of Justice, on the other, is, however, more apparent than real. The WTO Appellate Body seems to have taken the "concordant, common and consistent" formula from a publication[383] that stated that "the value of subsequent practice will naturally depend on the extent to which it is concordant, common and consistent".[384] The formula "concordant, common and consistent" thus provides an indication as to the circumstances under which subsequent practice under article 31, paragraph 3 (b), has more or less weight as a means of interpretation in a process of interpretation, rather than require any particular frequency in the practice.[385] The WTO Appellate Body itself on occasion has relied on this nuanced view.[386]

(11) The Commission, while finding that the formula "concordant, common and consistent" may be useful for determining the weight of subsequent practice in a particular case, also considers it as not being sufficiently well established to articulate a minimum threshold for the applicability of article 31, paragraph 3 (b), and as carrying the risk of being misconceived as overly prescriptive. Ultimately, the Commission continues to find that: "The value of subsequent practice varies according as it shows the common understanding of the parties as to the meaning of the terms."[387] This implies that a one-off practice of the parties that establishes their agreement regarding the interpretation needs to be taken into account under article 31, paragraph 3 (b).[388]

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[381] Iran-United States Claims Tribunal, Interlocutory Award No. ITL 83-B1-FT (Counterclaim) (see footnote 148 above), p. 77, at pp. 116–126, paras. 109–133.

[382] *Soering v. the United Kingdom*, no. 14038/88, 7 July 1989, ECHR Series A no. 161, para. 103; *Loizidou v. Turkey* (preliminary objections), no. 15318/89, 23 March 1995, ECHR Series A no. 310, paras. 73 and 79–82; *Banković et al. v. Belgium and 16 other contracting States* (dec.) [GC], no. 52207/99, ECHR 2001-XII, paras. 56 and 62; concerning the jurisprudence of ICSID tribunals, see Fauchald (footnote 107 above), p. 345; see also A. Roberts, "Power and persuasion in investment treaty interpretation: the dual role of States", *American Journal of International Law*, vol. 104, 2010, pp. 207–215.

[383] Sinclair, *The Vienna Convention* ... (see footnote 6 above), p. 137; see also Yasseen, "L'interprétation des traités…" (see footnote 6 above), pp. 48–49; whilst "commune" is taken from the work of the International Law Commission, "d'une certaine constance" and "concordante" are conditions that Yasseen derives through further reasoning; see *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 98–99, paras. 17–18 and p. 221–222, para. 15.

[384] Sinclair, *The Vienna Convention* ... (see footnote 6 above); Iran-United States Claims Tribunal, Interlocutory Award No. ITL 83-B1-FT (Counterclaim) (see footnote 148 above), p. 77, at p. 118, para. 114.

[385] *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, 18 February 1977, UNRIAA, vol. XXI, part II, pp. 53–264, at p. 187, para. 169; J.-P. Cot, "La conduite subséquente des parties a un traité", *Revue générale de droit international public*, vol. 70, 1966, pp. 644–647 ("valeur probatoire"); Distefano, "La pratique subséquente …" (see footnote 183 above), p. 46; Dörr, "Article 31 …" (see footnote 47 above), p. 598, para. 80; see also the oral argument before the International Court of Justice in *Maritime Dispute (Peru v. Chile)*, CR 2012/33, pp. 32–36, paras. 7–19 (Wood), available from www.icj-cij.org/docket/files/137/17218.pdf and CR 2012/36, pp. 13–18, paras. 6–21 (Wordsworth), available from www.icj-cij.org/docket/files/137/17234.pdf.

[386] WTO Appellate Body Report, *EC — Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R and WT/DS68/AB/R, 22 June 1998, para. 93.

[387] See *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 222, para. (15); Cot, "La conduite subséquente des parties …" (see footnote 385 above), p. 652.

[388] In practice, a one-off practice will often not be sufficient to establish an agreement of the parties regarding a treaty's interpretation, as a general rule, however, subsequent practice under article 31, paragraph 3 (b), does not require any repetition but only an agreement regarding the interpretation. The likelihood of an agreement established by an one-off practice thus depends on the act and the treaty in question, see E. Lauterpacht, "The development of the law of international organization by the decisions of international tribunals", *Recueil des cours ... 1976*, vol. 152, pp. 377–466, at p. 457; Linderfalk, *On the Interpretation of Treaties* (footnote 54 above), p. 166; C.F. Amerasinghe, "Interpretation of texts in open international organizations", *British Yearbook of International Law 1994*, vol. 65, p. 175, at p. 199; Villiger argues in favour of a certain frequency, but emphasizes that

(12) The weight of a subsequent practice may also ("*inter alia*") depend on other factors, such as consistency and breadth. A subsequent practice is more or less consistent depending on whether and how far conduct exceptionally deviates from the otherwise established pattern of practice. The breadth of a practice refers to the number of parties which engage in it and by which the agreement of all the parties is established.

Paragraph 3 — weight of subsequent practice under article 32

(13) Paragraph 3 of draft conclusion 9 addresses the weight that should be accorded to subsequent practice under article 32 (see draft conclusion 4, paragraph 3). It does not address when and under which circumstances such practice can be considered. The WTO Appellate Body has emphasized, in a comparable situation, that those two issues must be distinguished from each other:

> "... we consider that the European Communities conflates the preliminary question of what may qualify as a 'circumstance' of a treaty's conclusion with the separate question of ascertaining the degree of relevance that may be ascribed to a given circumstance, for purposes of interpretation under Article 32."[389]

The Appellate Body also held that:

> "... first, the Panel did *not* examine the classification practice in the European Communities during the Uruguay Round negotiations *as a supplementary means of interpretation* within the meaning of Article 32 of the *Vienna Convention*; and, second, the value of the classification practice as a supplementary means of interpretation ...".[390]

In order to determine the "relevance" of such subsequent practice, the Appellate Body referred to "objective factors":

> "These include the type of event, document, or instrument and its legal nature; temporal relation of the circumstance to the conclusion of the treaty; actual knowledge or mere access to a published act or instrument; subject matter of the document, instrument, or event in relation to the treaty provision to be interpreted; and whether or how it was used or influenced the negotiations of the treaty."[391]

(14) Whereas the Appellate Body did not use the term "specificity", it referred to the criteria mentioned above. Instead of clarity, the Appellate Body spoke of "consistency" and stated that consistency should not set a benchmark but rather determine the degree of relevance. "Consistent prior classification practice may often be significant. Inconsistent classification practice, however, *cannot* be relevant in interpreting the meaning of a tariff concession".[392]

(15) A further factor that helps determine the relevance under article 32 may be the number of affected states that engage in that practice. The Appellate Body has stated:

> "To establish this intention, the prior practice of only *one* of the parties may be relevant, but it is clearly of more limited value than the practice of all parties. In the specific case of the interpretation of a tariff concession in a Schedule, the

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the important point is the establishment of an agreement, Villiger, *Commentary* ... (see footnote 23 above), p. 431, para. 22. Yasseen and Sinclair write that practice cannot "in general" be established by one single act, Yasseen, "L'interprétation des traités ..." (see footnote 6 above), p. 47; Sinclair, *The Vienna Convention* ... (see footnote 6 above), p. 137; *cf.* Nolte, "Subsequent agreements and subsequent practice of States ..." (see footnote 48 above), p. 310.

[389] WTO Appellate Body Report, *EC — Chicken Cuts*, WT/DS269/AB/R and Corr.1, and WT/DS286/AB/R and Corr.1, adopted 27 September 2005, para. 297.

[390] WTO Appellate Body Report, *EC — Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R and WT/DS68/AB/R, adopted 22 June 1998, para. 92 (footnote omitted and original emphasis).

[391] *EC — Chicken Cuts* (see footnote 389 above), para. 290 (footnote omitted).

[392] *Ibid.*, para. 307 (footnote omitted and original emphasis); *cf.* also *EC — Computer Equipment* (see footnote 390 above), para. 95.

> classification practice of the importing Member, in fact, may be of great importance."[393]

At the same time it is true that

> "[i]t would be quite novel and potentially raise due process concerns in investment arbitration cases if a subsequent unilateral statement by one State could be given substantial, let alone decisive, weight".[394]

Conclusion 10
Agreement of the parties regarding the interpretation of a treaty

1. An agreement under article 31, paragraph 3 (a) and (b), requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept. Such an agreement may, but need not, be legally binding for it to be taken into account.

2. The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31, paragraph 3 (b), may vary. Silence on the part of one or more parties may constitute acceptance of the subsequent practice when the circumstances call for some reaction.

Commentary

Paragraph 1, first sentence — "common understanding"

(1) The first sentence of paragraph 1 sets forth the principle that an "agreement" under article 31, paragraph 3 (a) and (b), requires a common understanding by the parties regarding the interpretation of a treaty. In order for that common understanding to have the effect provided for under article 31, paragraph 3, the parties must be aware of it and accept the interpretation contained therein. While the difference regarding the form of an "agreement" under subparagraph (a) and subparagraph (b) has already been set out in draft conclusion 4 and its accompanying commentary,[395] paragraph 1 of draft conclusion 10 intends to capture what is common in the two subparagraphs, which is the agreement between the parties, in substance, regarding the interpretation of the treaty.

(2) The element that distinguishes subsequent agreements and subsequent practice as authentic means of interpretation under article 31, paragraph 3 (a) and (b), on the one hand, and other subsequent practice as a supplementary means of interpretation under article 32,[396] on the other, is the "agreement" of all the parties regarding the interpretation of the treaty. It is this agreement of the parties that provides the means of interpretation under article 31, paragraph 3,[397] their specific function and weight for the interactive process of interpretation under the general rule of interpretation of article 31.[398]

(3) Conflicting positions expressed by different parties to a treaty preclude the existence of an agreement. This has been confirmed, *inter alia*, by the Arbitral Tribunal in the case of *German External Debts*, which held that a "tacit subsequent understanding" could not be

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[393] *EC — Computer Equipment* (see footnote 390 above), para. 93 (original emphasis).

[394] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay* (see footnote 128 above), para. 476.

[395] See above commentary to draft conclusion 4, para. (10).

[396] See above draft conclusions 3 and 4, para. 3.

[397] See Crawford, "A consensualist interpretation of article 31 (3) ..." (footnote 216 above), p. 30: "There is no reason to think that the word 'agreement' in para. (b) has any different meaning as compared to the meaning it has in para. (a)."

[398] See above commentary to draft conclusion 2, paras. (12)–(15); article 31 must be "read as a whole" and conceives of the process of interpretation as "a single combined operation" and is "not laying down a legal hierarchy of norms for the interpretation of treaties", *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 219, para. (8), and p. 220, para. (9).

derived from a number of communications by administering agencies since one of those agencies, the Bank of England, had expressed a divergent position.[399]

(4) However, agreement is only absent to the extent that the positions of the parties conflict and for as long as their positions conflict. The fact that parties apply a treaty differently does not, as such, permit a conclusion that there are conflicting positions regarding the interpretation of the treaty. Such a difference may indicate a disagreement over the one correct interpretation, but it may also simply reflect a common understanding that the treaty permits a certain scope for the exercise of discretion in its application.[400] Treaties that are characterized by considerations of humanity or other general community interests, such as treaties relating to human rights or refugees, tend to aim at a uniform interpretation but also to leave a margin of appreciation for the exercise of discretion by States.

(5) Whereas equivocal conduct by one or more parties will normally prevent the identification of an agreement,[401] not every element of the conduct of a State that does not fully fit into a general picture necessarily renders the conduct of that State equivocal. The Court of Arbitration in the *Beagle Channel* case, for example, found that although at one point the parties had a difference of opinion regarding the interpretation of a treaty, that fact did not necessarily establish that the lack of agreement was permanent:

> "In the same way, negotiations for a settlement, that did not result in one, could hardly have any permanent effect. At the most they might temporarily have deprived the acts of the Parties of probative value in support of their respective interpretations of the Treaty, insofar as these acts were performed during the process of the negotiations. The matter cannot be put higher than that."[402]

(6) Similarly, in *Loizidou v. Turkey*, the European Court of Human Rights held that the scope of the restrictions that the parties could place on their acceptance of the competence of the Commission and the Court was "confirmed by the subsequent practice of the Contracting Parties", that is, "the evidence of a practice denoting practically universal agreement amongst Contracting Parties that Articles 25 and 46 … of the Convention do not permit territorial or substantive restrictions".[403] The Court, applying article 31, paragraph 3 (b), described "such a State practice" as being "uniform and consistent", despite the fact that it simultaneously recognized that two States possibly constituted exceptions.[404] The decision suggests that interpreters, at least under the European Convention, possess some margin when assessing whether an agreement of the parties regarding a certain interpretation is established.[405]

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[399] *Case concerning the question whether the re-evaluation of the German Mark in 1961 and 1969 constitutes a case for application of the clause in article 2 (e) of Annex I A of the 1953 Agreement on German External Debts between Belgium, France, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States of America on the one hand and the Federal Republic of Germany on the other*, Award of 16 May 1980, UNRIAA, vol. XIX, part III, pp. 67–145, pp. 103–104, para. 31; see also *EC — Computer Equipment* (footnote 390 above), para. 95; *Case concerning the delimitation of the maritime boundary between Guinea and Guinea-Bissau* (footnote 339 above), p. 175, para. 66.

[400] See above commentary to draft conclusion 7, paras. (12)–(15).

[401] *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France* (see footnote 145 above), p. 258, para. 70; Kolb, "La modification d'un traité …" (see footnote 304 above), p. 16.

[402] *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, 18 February 1977, UNRIAA, vol. XXI, part II, pp. 53–264, at p. 188, para. 171.

[403] *Loizidou v. Turkey* (preliminary objections), no. 15318/89, 23 March 1995, ECHR Series A no. 310, paras. 79 and 81.

[404] *Ibid.*, paras. 80 and 82; the case did not concern the interpretation of a particular human right, but rather the question of whether a State was bound by the Convention at all.

[405] The more restrictive jurisprudence of the WTO Dispute Settlement Body suggests that different interpreters may evaluate matters differently, see *United States — Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, WT/DS294/R, adopted 9 May 2006, para. 7.218: "… even if it were established conclusively that all the 76 Members referred to by the

(7) The term "agreement" in the 1969 Vienna Convention[406] does not imply any particular requirements of form,[407] including for an "agreement" under article 31, paragraph 3 (a) and (b).[408] The Commission, however, has noted that, in order to distinguish a subsequent agreement under article 31, paragraph 3 (a), and a subsequent practice that "establishes the agreement" of the parties under article 31, paragraph 3 (b), the former presupposes a "common act".[409] There is no requirement that an agreement under article 31, paragraph 3 (a), be published or registered under Article 102 of the Charter of the United Nations.[410]

(8) For an agreement under article 31, paragraph 3, to be "common", it is sometimes sufficient that the parties reach the same understanding individually, but sometimes necessary that the parties have a mutual awareness of a shared understanding. This depends on the character of the treaty obligation in question. In the *Kasikili/Sedudu Island* case, the International Court of Justice required that, for practice to fall under article 31, paragraph 3 (b), the "Bechuanaland authorities were fully aware of and accepted this as a confirmation of the Treaty boundary".[411] In certain circumstances, the awareness and acceptance of the position of the other party or parties may be assumed, particularly in the case of treaties that are implemented at the national level.

Paragraph 1, second sentence — possible legal effects of agreement under article 31, paragraph 3 (a) and (b)

(9) The aim of the second sentence of paragraph 1 is to reaffirm that "agreement", for the purpose of article 31, paragraph 3, need not, as such, be legally binding,[412] in contrast to other provisions of the 1969 Vienna Convention in which the term "agreement" is used in the sense of a legally binding instrument.[413]

(10) This is confirmed by the fact that the Commission, in its final draft articles on the law of treaties, used the expression "any subsequent practice which establishes the

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European Communities have adopted a [certain] practice … this would only mean that a considerable number of WTO Members have adopted an approach different from that of the United States. … We note that one third party in this proceeding submitted arguments contesting the view of the European Communities … ."

[406] See articles 2, para. 1 (a), 3, 24, para. 2, 39–41, 58 and 60.

[407] See above commentary to draft conclusion 4, para. (5); confirmed by the Permanent Court of Arbitration in the *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award of 7 July 2014, available at www.pca-cpa.org/showfile.asp?fil_id=2705, p. 47, para. 165; Yasseen, "L'interprétation des traités …" (see footnote 6 above), p. 45; Distefano, "La pratique subséquente …" (see footnote 183 above), p. 47.

[408] See above commentary to draft conclusion 4, para. (5); Gardiner, *Treaty Interpretation* (see footnote 5 above), pp. 231–232 and 243–247; Aust, *Modern Treaty Law and Practice* (see footnote 134 above), p. 213; Dörr, "Article 31 …" (see footnote 47 above), p. 594, para. 75; R. Gardiner, "The Vienna Convention rules on treaty interpretation", in *The Oxford Guide to Treaties*, D.B. Hollis, ed. (Oxford, Oxford University Press, 2012), pp. 475 and 483.

[409] See above commentary to draft conclusion 4, para. (10); a "single common act" may also consist of an exchange of letters, see *European Molecular Biology Laboratory Arbitration (EMBL v. Germany)*, 29 June 1990, *International Law Reports*, vol. 105 (1997), p. 1, at pp. 54–56; Fox, "Article 31 (3) (a) and (b) …" (footnote 48 above), p. 63; Gardiner, *Treaty Interpretation* (footnote 5 above), pp. 248–249.

[410] Aust, "The theory and practice of informal international instruments" (see footnote 73 above), pp. 789–790.

[411] *Kasikili/Sedudu Island* (see footnote 8 above), p. 1094, para. 74 ("occupation of the island by the Masubia tribe") and pp. 1077, para. 55 ("Eason Report", which "appears never to have been made known to Germany"); Dörr, "Article 31 …" (see footnote 47 above), pp. 602–603, para. 89.

[412] See above commentary to draft conclusion 4, para. (6); P. Gautier, "Non-binding agreements", in *Max Planck Encyclopedia of Public International Law* (www.mpepil.com), para. 14; Benatar, "From probative value to authentic interpretation …" (see footnote 48 above), pp. 194–195; Aust, *Modern Treaty Law and Practice* (see footnote 134 above), p. 213; Gardiner, *Treaty Interpretation* (see footnote 5 above), p. 244; see also Nolte, "Subsequent agreements and subsequent practice of States …" (footnote 48 above), p. 307, at p. 375.

[413] See articles 2, para. 1 (a), 3, 24, para. 2, 39–41, 58 and 60.

understanding [emphasis added] of the parties".[414] The expression "understanding" indicates that the term "agreement" in article 31, paragraph 3, does not require that the parties thereby undertake or create any legal obligation existing in addition to, or independently from, the treaty.[415] The Vienna Conference replaced the expression "understanding" by the word "agreement" not for any substantive reason but "related to drafting only" in order to emphasize that the understanding of the parties was to be their "common" understanding.[416] An "agreement" under article 31, paragraph 3 (a), equally need not be legally binding.[417]

(11) It is thus sufficient that the parties, by a subsequent agreement or a subsequent practice under article 31, paragraph 3, attribute a certain meaning to the treaty[418] or, in other words, adopt a certain "understanding" of the treaty.[419] Subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), even if they are not in themselves legally binding, can thus nevertheless, as means of interpretation, give rise to legal consequences as part of the process of interpretation according to article 31.[420] Accordingly, international courts and tribunals have not required that an "agreement" under article 31, paragraph 3, reflect the intention of the parties to create new, or separate, legally binding undertakings.[421] Similarly, memoranda of understanding have been recognized, on

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[414] See *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 222, para. (15).

[415] *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, 18 February 1977, UNRIAA, vol. XXI, part II, pp. 53–264, at p. 187, para. 169; *The Question whether the re-evaluation of the German Mark in 1961 and 1969 constitutes a case for application of the clause in article 2 (e) of Annex I A of the 1953 Agreement on German External Debts between Belgium, France, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States of America on the one hand and the Federal Republic of Germany on the other*, 16 May 1980, *ibid.*, vol. XIX, pp. 67–145, pp. 103–104, para. 31; Karl, *Vertrag und spätere Praxis …* (see footnote 62 above), pp. 190–195; Kolb, "La modification d'un traité …" (see footnote 304 above), pp. 25–26; Linderfalk, *On the Interpretation of Treaties* (see footnote 54 above), pp. 169–171.

[416] *Official Records of the United Nations Conference on the Law of Treaties …* (A/CONF.39/11) (see footnote 185 above), thirty-first meeting, 19 April 1968, p. 169, at para. 59 (Australia); P. Gautier, "Les accords informels et la Convention de Vienne sur le droit des traités entre États", in *Droit du pouvoir, pouvoir du droit: mélanges offerts à Jean Salmon*, N. Angelet, ed. (Brussels, Bruylant, 2007), pp. 425–454, at pp. 430–431 ("La lettre [a] du paragraphe 3 fait référence à un accord interprétatif et l'on peut supposer que le terme 'accord' est ici utilisé dans un sens générique, qui ne correspond pas nécessairement au 'traité' défini à l'article 2 de la convention de Vienne. Ainsi, l'accord interprétatif ultérieur pourrait être un accord verbal, voire un accord politique").

[417] See Gautier, "Non-binding agreements" (footnote 412 above), para. 14; Aust, *Modern Treaty Law and Practice* (see footnote 134 above), pp. 211, 213.

[418] This terminology follows the commentary of guideline 1.2. (Definition of interpretative declarations) of the Commission's guide to practice on reservations to treaties (see *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10*, A/66/10/Add.1, paras. (18) and (19)).

[419] See *Yearbook … 1966*, vol. II, document A/6309/Rev.1, pp. 221-222, paras. (15) and (16) (uses of the term "understanding" both in the context of what became article 31, para. 3 (a), as well as what became article 31, para. 3 (b)).

[420] *United States-United Kingdom Arbitration concerning Heathrow Airport User Charges, Award on the First Question*, 30 November 1992, UNRIAA, vol. XXIV (Sales No. E/F.04.V.18), pp. 1–359, at p. 131, para. 6.7; Aust, "The theory and practice of informal international instruments" (see footnote 73 above), pp. 787 and 807; Linderfalk, *On the Interpretation of Treaties* (see footnote 54 above), p. 173; Hafner, "Subsequent agreements and practice …" (see footnote 265 above), pp. 110–113; Gautier, "Les accords informels et la Convention de Vienne …" (see footnote 416 above), p. 434.

[421] For example, "… pattern implying the agreement of the parties regarding its interpretation …" (WTO Appellate Body Report, *Japan — Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, adopted 1 November 1996, section E, p. 13); or "… pattern … must imply *agreement* on the interpretation of the relevant provision" (WTO Panel Report, *European Communities and its member States — Tariff Treatment of Certain Information Technology Products*, WT/DS375/R, WT/DS376/R and WT/DS377/R, adopted 21 September 2010, para. 7.558); or "… practice [that] reflects an agreement as to the interpretation …" (Iran-United States Claims Tribunal, Interlocutory Award No. ITL 83-B1-FT (Counterclaim) (see footnote 148 above), p. 77, at p. 119, para. 116); or that "… State practice" was "… indicative of a lack of any apprehension on the part of the Contracting States …" (*Banković et al. v. Belgium and 16 other contracting States*

occasion, as "a potentially important aid to interpretation" — but "not a source of independent legal rights and duties".[422]

Paragraph 2 — forms of participation in subsequent practice

(12) The first sentence of paragraph 2 confirms the principle that not all the parties must engage in a particular practice to constitute agreement under article 31, paragraph 3 (b). The second sentence clarifies that acceptance of such practice by those parties not engaged in the practice can under certain circumstances be brought about by silence or inaction.

(13) From the outset, the Commission has recognized that an "agreement" deriving from subsequent practice under article 31, paragraph 3 (b), can result, in part, from silence or inaction by one or more parties. Explaining why it used the expression "the understanding of the parties" in draft article 27, paragraph 3 (b) (which later became "the agreement" in article 31, paragraph 3 (b) (see paragraph (10) above)) and not the expression "the understanding of *all* the parties", the Commission stated that:

> "It considered that the phrase 'the understanding of the parties' necessarily means 'the parties as a whole'. It omitted the word 'all' merely to avoid any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice."[423]

(14) The International Court of Justice has also recognized the possibility of expressing agreement regarding interpretation by silence or inaction by stating, in the case concerning the *Temple of Preah Vihear*, that "where it is clear that the circumstances were such as called for some reaction, within a reasonable period", the State confronted with a certain subsequent conduct by another party "must be held to have acquiesced".[424] This general proposition of the Court regarding the role of silence for the purpose of establishing agreement regarding the interpretation of a treaty by subsequent practice has been confirmed by later decisions,[425] and is generally supported by writers.[426] The

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(dec.) [GC], no. 52207/99, ECHR 2001-XII, para. 62); "[T]he Tribunal is not bound by the views of either State Party. Although the Tribunal must 'take into account' any subsequent agreement between the State Parties pursuant to Article 31(3)(a) of the [1969 Vienna Convention], the proper interpretation of Article 10.18 and how it should be applied to the facts of this case are tasks which reside exclusively with this Tribunal": *The Renco Group Inc. v. Republic of Peru* (see footnote 15 above), para. 156.

[422] *United States-United Kingdom Arbitration concerning Heathrow Airport* (see footnote 420 above), p. 131, para. 6.7; see also *Arbitration regarding the Iron Rhine* (see footnote 10 above), p. 98, para. 157.

[423] *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 222, para. (15).

[424] *Case concerning the Temple of Preah Vihear* (see footnote 97 above), p. 23.

[425] See also *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, p. 815, para. 30; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392, at p. 410, para. 39; *Prosecutor v. Anto Furundžija* (see footnote 349 above), paras. 165 *et seq.*, at para. 179; *Rantsev v. Cyprus and Russia*, no. 25965/04, 7 January 2010, ECHR 2010 (extracts), para. 285; cautiously: WTO Appellate Body Report, *EC — Chicken Cuts* WT/DS269/AB/R and Corr.1, WT/DS286/AB/R and Corr.1, adopted 27 September 2005, para. 272; see, also, for a limited holding, Iran-United States Claims Tribunal, Award No. 30-16-3, *RayGo Wagner Equipment Company v. Iran Express Terminal Corporation, Iran-United States Claims Tribunal Reports*, vol. 2 (1983), p. 141, at p. 144; *The Question whether the re-evaluation of the German Mark in 1961 and 1969 constitutes a case for application of the clause in article 2 (e) of Annex I A of the 1953 Agreement on German External Debts between Belgium, France, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States of America on the one hand and the Federal Republic of Germany on the other*, 16 May 1980, UNRIAA, vol. XIX, pp. 67–145, pp. 103–104, para. 31.

[426] Kamto, "La volonté de l'État en droit international" (see footnote 146 above), pp. 134–141; Yasseen, "L'interprétation des traités ..." (see footnote 6 above), p. 49; Gardiner, *Treaty Interpretation* (see footnote 5 above), p. 267; Villiger, *Commentary ...* (see footnote 23 above), p. 431, para. 22; Dörr, "Article 31 ..." (see footnote 47 above), pp. 599–600 and 601–602, paras. 84 and 87.

circumstances" that will "call for some reaction" include the particular setting in which the States parties interact with each other in respect of the treaty.[427]

(15) The Court of Arbitration in the *Beagle Channel* case[428] dealt with the contention by Argentina that acts of jurisdiction by Chile over certain islands could not be counted as relevant subsequent conduct, since Argentina had not reacted to these acts. The Court, however, held:

> "The terms of the Vienna Convention do not specify the ways in which 'agreement' may be manifested. In the context of the present case the acts of jurisdiction were not intended to establish a source of title independent of the terms of the treaty; nor could they be considered as being in contradiction of those terms as understood by Chile. The evidence supports the view that they were public and well-known to Argentina, and that they could only derive from the Treaty. Under these circumstances the silence of Argentina permits the inference that the acts tended to confirm an interpretation of the meaning of the Treaty independent of the acts of jurisdiction themselves."[429]

In the same case, the Court of Arbitration considered that:

> "The mere publication of a number of maps of (as the Court has already shown) extremely dubious standing and value could not — even if they nevertheless represented the official Argentine view — preclude or foreclose Chile from engaging in acts that would, correspondingly, demonstrate her own view of what were her rights under the 1881 Treaty — nor could such publication of itself absolve Argentina from all further necessity for reaction in respect of those acts, if she considered them contrary to the Treaty."[430]

(16) The significance of silence also depends on the legal situation to which the subsequent practice by the other party relates and on the claim thereby expressed. Thus, in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, the International Court of Justice held that:

> "Some of these activities — the organization of public health and education, policing, the administration of justice — could normally be considered to be acts *à titre de souverain*. The Court notes, however, that, as there was a pre-existing title held by Cameroon in this area, the pertinent legal test is whether there was thus evidenced acquiescence by Cameroon in the passing of the title from itself to Nigeria."[431]

(17) This judgment suggests that in cases that concern treaties delimiting a boundary the circumstances will only very exceptionally call for a reaction with respect to conduct that runs counter to the delimitation. In such situations, there appears to be a strong presumption that silence or inaction does not constitute acceptance of a practice.[432]

(18) The relevance of silence or inaction for the establishment of an agreement regarding interpretation depends to a large extent on the circumstances of the specific case. Decisions

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[427] For example, when acting within the framework of an international organization, see *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), Judgment of 5 December 2011, I.C.J. Reports 2011*, p. 644, at pp. 675–676, paras. 99–101; Kamto, "La volonté de l'État en droit international" (see footnote 146 above), p. 136.

[428] *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, 18 February 1977, UNRIAA, vol. XXI, part II, pp. 53–264.

[429] *Ibid.*, p. 187, para. 169 (a).

[430] *Ibid.*, p. 188, para. 171.

[431] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303, at p. 352, para. 67.

[432] *Ibid.*, p. 351, para. 64: "… The Court notes, however, that now that it has made its findings that the frontier in Lake Chad was delimited …, it … follows that any Nigerian *effectivités* are indeed to be evaluated for their legal consequences as acts *contra legem*"; see also *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554, at p. 586, para. 63; *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal* (see footnote 339 above), p. 181, para. 70.

of international courts and tribunals demonstrate that acceptance of a practice by one or more parties by way of silence or inaction is not easily established.

(19) International courts and tribunals have, for example, been reluctant to accept that parliamentary proceedings or domestic court judgments be considered as subsequent practice under article 31, paragraph 3 (b), to which other parties to the treaty would be expected to react, even if such proceedings or judgments had come to their attention through other channels, including by their own diplomatic service.[433]

(20) Further, even where a party, by its conduct, expresses a certain position towards another party (or parties) regarding the interpretation of a treaty, this does not necessarily call for a reaction by the other party or parties. In the *Kasikili/Sedudu Island* case, the International Court of Justice held that a State that did not react to the findings of a joint commission of experts, which had been entrusted by the parties to determine a particular factual situation with respect to a disputed matter, did not thereby provide a ground for the conclusion that an agreement had been reached with respect to the dispute.[434] The Court found that the parties had considered the work of the experts as being merely a preparatory step for a separate decision subsequently to be taken at the political level. At a more general level, the WTO Appellate Body has held that:

> "… in specific situations, the 'lack of reaction' or silence by a particular treaty party may, in the light of attendant circumstances, be understood as acceptance of the practice of other treaty parties. Such situations may occur when a party that has not engaged in a practice has become or has been made aware of the practice of other parties (for example, by means of notification or by virtue of participation in a forum where it is discussed), but does not react to it."[435]

The International Tribunal for the Law of the Sea has confirmed this approach. Taking into account the practice of States in interpreting articles 56, 58 and 73 of the United Nations Convention on the Law of the Sea, the Tribunal stated:

> "The Tribunal acknowledges that the national legislation of several States, not only in the West African region, but also in some other regions of the world, regulates bunkering of foreign vessels fishing in their exclusive economic zones in a way comparable to that of Guinea-Bissau. The Tribunal further notes that there is no manifest objection to such legislation and that it is, in general, complied with."[436]

(21) Decisions by domestic courts have also recognized that silence on the part of a party to a treaty can only be taken to mean acceptance "if the circumstances call for some reaction".[437] Such circumstances have sometimes been recognized in certain cooperative contexts, for example under a bilateral treaty that provides for a particularly close form of cooperation.[438] This may be different if the cooperation that is envisaged by the treaty takes place in the context of an international organization whose rules preclude using the practice of the parties, and their silence for the purpose of interpretation.[439]

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[433] *Sovereignty over Pulau Ligitan and Pulau Sipadan* (see footnote 8 above), p. 650, para. 48; WTO Appellate Body Report, *EC — Chicken Cuts*, WT/DS269/AB/R and Corr.1, WT/DS286/AB/R and Corr.1, adopted 27 September 2005, para. 334 ("… mere access to a published judgment cannot be equated with acceptance …"); see also Court of Justice of the European Union, Judgment of 21 December 2016, Case C-104/16 P, *Council v. Front Polisario* [2016], *European Court Reports* 973, para. 118.

[434] *Kasikili/Sedudu Island* (see footnote 8 above), pp. 1089–1091, paras. 65–68.

[435] WTO Appellate Body Report, *EC — Chicken Cuts* (see footnote 433 above), para. 272 (footnote omitted).

[436] *The M/V "Virginia G" (Panama/Guinea-Bissau)*, Judgment, *ITLOS Reports 2014*, para. 218.

[437] Switzerland, Federal Court, judgment of 17 February 1971, BGE, vol. 97 I, p. 359, at pp. 370–371.

[438] See United States, Supreme Court, *O'Connor et ux. v. United States*, 479 U.S. 27, at pp. 33–35; Germany, Federal Constitutional Court, BVerfGE, vol. 59, p. 63, at pp. 94–95.

[439] See United Kingdom, Supreme Court: on the one hand, *Assange v. The Swedish Prosecution Authority* [2012] UKSC 22, paras. 68–71 (Lord Phillips); and, on the other, *Bucnys v. Ministry of Justice, Lithuania* [2013] UKSC 71, paras. 39–43 (Lord Mance).

(22) The possible legal significance of silence or inaction in the face of a subsequent practice of a party to a treaty is not limited to contributing to a possible underlying common agreement, but may also play a role for the operation of non-consent-based rules, such as estoppel, preclusion or prescription.[440]

(23) Once established, an agreement between the parties under article 31, paragraph 3 (a) and (b), can eventually be terminated. The parties may replace it by another agreement with a different scope or content under article 31, paragraph 3. In this case, the new agreement replaces the previous one as an authentic means of interpretation from the date of its existence, at least with effect for the future.[441] Such situations, however, should not be lightly assumed as States usually do not change their interpretation of a treaty according to short-term considerations.

(24) It is also possible for a disagreement to arise between the parties regarding the interpretation of a treaty after they had reached a subsequent agreement regarding such interpretation. Such a disagreement, however, normally will not replace the prior subsequent agreement, since the principle of good faith prevents a party from simply disavowing the legitimate expectations that have been created by a common interpretation.[442] On the other hand, clear expressions of disavowal by one party of a previous understanding arising from common practice "do reduce in a major way the significance of the practice after that date", without, however, diminishing the significance of the previous common practice.[443]

Part Four
Specific aspects

Conclusion 11
Decisions adopted within the framework of a Conference of States Parties

1. A Conference of States Parties, under these draft conclusions, is a meeting of parties to a treaty for the purpose of reviewing or implementing the treaty, except where they act as members of an organ of an international organization.

2. The legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty and any applicable rules of procedure. Depending on the circumstances, such a decision may embody, explicitly or implicitly, a subsequent agreement under article 31, paragraph 3 (a), or give rise to subsequent practice under article 31, paragraph 3 (b), or to subsequent practice under article 32. Decisions adopted within the framework of a Conference of States Parties often provide a non-exclusive range of practical options for implementing the treaty.

3. A decision adopted within the framework of a Conference of States Parties embodies a subsequent agreement or subsequent practice under article 31, paragraph 3, in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted, including adoption by consensus.

Commentary

(1) Draft conclusion 11 addresses a particular form of action by States that may result in a subsequent agreement or subsequent practice under article 31, paragraph 3, or subsequent

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[440] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, I.C.J. Reports 1962*, p. 151, at p. 182 (Dissenting Opinion of Judge Spender).

[441] Hafner, "Subsequent agreements and practice ..." (see footnote 265 above), p. 118; this means that the interpretative effect of an agreement under article 31, para. 3, does not necessarily go back to the date of the entry into force of the treaty, as Yasseen maintains, "L'interprétation des traités..." (see footnote 6 above), p. 47.

[442] Karl, *Vertrag und spätere Praxis* ... (see footnote 62 above), p. 151.

[443] *Maritime Dispute (Peru v. Chile), Judgment, I.C.J. Reports 2014*, p. 3, at p. 52, para. 142.

practice under article 32, namely, decisions adopted within the framework of Conferences of States Parties.[444]

Paragraph 1 — definition of Conferences of States Parties

(2) Conferences of States Parties are a form of action for the continuous process of multilateral treaty review and implementation.[445] Such Conferences can be roughly divided into two basic categories. First, some Conferences are actually an organ of an international organization within which States parties act in their capacity as members of that organ (for example, meetings of the parties of the World Trade Organization, the Organization for the Prohibition of Chemical Weapons or the International Civil Aviation Organization).[446] Such Conferences do not fall within the scope of draft conclusion 11, which does not address the subsequent practice of and within international organizations.[447] Second, other Conferences of States Parties are convened with respect to treaties that do not establish an international organization; rather, the treaty simply provides, or allows, for more or less periodic meetings of the parties for their review and implementation. Such review conferences are frameworks for parties' cooperation and subsequent conduct with respect to the treaty. Either type of Conference of States Parties may also have specific powers concerning amendments and/or the adaptation of treaties. Examples include the review conference process of the 1972 Biological Weapons Convention,[448] the Review Conference under article VIII, paragraph 3, of the 1968 Non-Proliferation Treaty,[449] and Conferences of the Parties established by international environmental treaties.[450] The International Whaling

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[444] Other designations include: "Meetings of the Parties" or "Assemblies of the States Parties".

[445] See V. Röben, "Conference (Meeting) of States Parties", in *Max Planck Encyclopedia of Public International Law* (www.mpepil.com), p. 605; R.R. Churchill and G. Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreements: a little-noticed phenomenon in international law", *American Journal of International Law*, vol. 94, No. 4 (2000), pp. 623–659; J. Brunnée, "COPing with consent: law-making under multilateral environmental agreements", *Leiden Journal of International Law*, vol. 15, No. 1 (2002), pp. 1-52; A. Wiersema, "The new international law-makers? Conference of the Parties to multilateral environmental agreements", *Michigan Journal of International Law*, vol. 31, No. 1 (2009), pp. 231–287; L. Boisson de Chazournes, "Environmental treaties in time", *Environmental Policy and Law*, vol. 39, No. 6 (2009), pp. 293–298.

[446] Marrakesh Agreement establishing the World Trade Organization (1994) (see footnote 53 above); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1993) (see footnote 155 above); Convention on International Civil Aviation (Chicago Convention, 1944), United Nations, *Treaty Series*, vol. 15, No. 102, p. 295.

[447] See draft conclusion 12 below.

[448] See Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (1972) (see footnote 155 above), art. XI. According to this mechanism, States parties meeting in a review conference shall "... review the operation of the Convention, with a view to assuring that the purposes of the preamble and the provisions of the Convention ... are being realised. Such review shall take into account any new scientific and technological developments relevant to the Convention" (art. XII).

[449] Treaty on the Non-Proliferation of Nuclear Weapons (1968), United Nations, *Treaty Series*, vol. 729, No. 10485, p. 161; art. VIII, para. 3, provides that a review conference shall be held five years after its entry into force, and, if so decided, at intervals of five years thereafter "... in order to review the operation of this Treaty with a view to assuring that the purposes of the preamble and the provisions of the Treaty are being realised". By way of such decisions, States parties review the operation of the Treaty on the Non-Proliferation of Nuclear Weapons, article by article, and formulate conclusions and recommendations on follow-on actions.

[450] Examples include the Conference of the Parties of the United Nations Framework Convention on Climate Change (1992) (United Nations, *Treaty Series*, vol. 1771, No. 30822, p. 107), the CMP Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol, 1997) (United Nations, *Treaty Series*, vol. 2303, No. 30822, p. 161) and the Conference of the Contracting Parties of the Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention, 1971) (United Nations, *Treaty Series*, vol. 996, No. 14583, p. 245).

Commission under the International Convention for the Regulation of Whaling[451] is a borderline case between the two basic categories of Conferences of States Parties and its subsequent practice was considered in the judgment of the International Court of Justice in the *Whaling in the Antarctic* case.[452]

(3) Since Conferences of States Parties are usually established by treaties they are, in a sense, "treaty bodies". However, they should not be confused with bodies that are comprised of independent experts (see draft conclusion 13) or bodies with a limited membership. Conferences of States Parties are more or less periodical meetings that are open to all of the parties of a treaty. Conferences of States Parties may be established by treaties with a universal membership, as well as by treaties with a more limited membership.

(4) In order to acknowledge the wide diversity of Conferences of States Parties and the rules under which they operate, paragraph 1 provides a broad definition of the term "Conference of States Parties" for the purpose of these draft conclusions, which only excludes action of States as members of an organ of an international organization (which will be the subject of a later draft conclusion). The term thus also includes conferences of the parties to a treaty whose parties are not only States.

Paragraph 2, first sentence — legal effect of decisions

(5) The first sentence of paragraph 2 recognizes that the legal significance of any acts undertaken by Conferences of States Parties depends, in the first instance, on the rules that govern the Conferences of States Parties, notably the constituent treaty and any applicable rules of procedure. Conferences of States Parties perform a variety of acts, including reviewing the implementation of the treaty, reviewing the treaty itself and decisions under amendment procedures.[453]

(6) The powers of a Conference of States Parties can be contained in general clauses or in specific provisions, or both. For example, article 7, paragraph 2, of the United Nations Framework Convention on Climate Change begins with the following general language, before enumerating 13 specific tasks for the Conference, one of which concerns examining the obligations of the Parties under the treaty:

> "The Conference of the Parties, as the supreme body of this Convention, shall keep under regular review the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention."

(7) Specific provisions contained in various treaties refer to the Conference of the Parties proposing "guidelines" for the implementation of particular treaty provisions[454] or defining "the relevant principles, modalities, rules and guidelines" for a treaty scheme.[455]

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[451] The Convention is often described as establishing an international organization, but it does not do so clearly, and it provides the International Whaling Commission with features that fit the present definition of a Conference of States Parties.

[452] *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226, at p. 248, para. 46.

[453] Convention on Wetlands of International Importance especially as Waterfowl Habitat: art. 6, para. 1, on review functions and art. 10 *bis*, on amendments; United Nations Framework Convention on Climate Change, art. 7, para. 2, on review powers, and art. 15, on amendments; Kyoto Protocol, art. 13, para. 4, on review powers of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, art. 20 on amendment procedures; Convention on International Trade in Endangered Species of Wild Fauna and Flora (United Nations, *Treaty Series*, vol. 993, No. 14537, p. 243), art. XI on Conference of the Parties, and art. XVII on amendment procedures; Treaty on the Non-Proliferation of Nuclear Weapons; World Health Organization Framework Convention on Tobacco Control (United Nations, *Treaty Series*, vol. 2302, No. 41032, p. 166), art. 23, para. 5 (review powers), art. 28 (amendments) and art. 33 (protocols).

[454] Arts. 7 and 9 of the World Health Organization Framework Convention on Tobacco Control.

[455] Art. 17 of the Kyoto Protocol provides an example, see Churchill and Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreements …" (footnote 445 above), p. 639;

(8) Amendment procedures (in a broad sense of the term) include procedures by which the primary text of the treaty may be amended (the result of which mostly requires ratification by States parties according to their constitutional procedures), as well as tacit acceptance and opt-out procedures[456] that commonly apply to annexes, containing lists of substances, species or other elements that need to be updated regularly.[457]

(9) As a point of departure, paragraph 2 provides that the legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty in question and any applicable rules of procedure. The word "primarily" leaves room for subsidiary rules "unless the treaty otherwise provides" (see for example, articles 16, 20, 22, paragraph 1, 24, 70, paragraph 1, and 72, paragraph 1, of the 1969 Vienna Convention). The word "any" clarifies that rules of procedure of Conferences of States Parties, if they exist, will apply, given that there may be situations where such conferences operate with no specifically adopted rules of procedure.[458]

Paragraph 2, second sentence — decisions as possibly embodying a subsequent agreement or subsequent practice

(10) The second sentence of paragraph 2 recognizes that decisions of Conferences of States Parties may constitute subsequent agreement or subsequent practice for treaty interpretation under articles 31 and 32 of the 1969 Vienna Convention. Decisions adopted within the framework of Conferences of States Parties can perform an important function for determining the Parties' common understanding of the meaning of the treaty.

(11) Decisions of Conferences of States Parties, *inter alia*, may constitute or reflect subsequent agreements under article 31, paragraph 3 (a), by which the parties interpret the underlying treaty. For example, the Biological Weapons Convention Review Conference has regularly adopted "understandings and additional agreements" regarding the interpretation of the Convention's provisions. These agreements have been adopted by States parties within the framework of the review conferences, by consensus, and they "have evolved across all articles of the treaty to address specific issues as and when they arose".[459] Through these understandings, States parties interpret the provisions of the Convention by defining, specifying or otherwise elaborating on the meaning and scope of the provisions, as well as through the adoption of guidelines on their implementation. The Biological Weapons Convention Implementation and Support Unit[460] defines an "additional agreement" as one which:

> (i) Interprets, defines or elaborates the meaning or scope of a provision of the Convention; or
>
> (ii) Provides instructions, guidelines or recommendations on how a provision should be implemented.[461]

J. Brunnée, "Reweaving the fabric of international law? Patterns of consent in environmental framework agreements", in *Developments of International Law in Treaty Making*, R. Wolfrum and V. Röben, eds. (Berlin, Springer, 2005), pp. 110–115.

[456] See J. Brunnée, "Treaty amendments", in Hollis, *The Oxford Guide to Treaties* (footnote 408 above), pp. 354–360.

[457] *Ibid.*

[458] This is the case, for example, for the United Nations Framework Convention on Climate Change.

[459] See P. Millett, "The Biological Weapons Convention: securing biology in the twenty-first century", *Journal of Conflict and Security Law*, vol. 15, No. 1 (2010), pp. 25–43, at p. 33.

[460] The "Implementation Support Unit" was created by the Conference of States Parties, in order to provide administrative support to the Conference, and to enhance confidence-building measures among States parties (see Final Document of the Sixth Review Conference of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (BWC/CONF.VI/6), Part. III (decisions and recommendations), para. 5).

[461] See background information document submitted by the Implementation and Support Unit, prepared for the Seventh Review Conference of the States Parties to the Convention, entitled "Additional understandings and agreements reached by previous Review Conferences relating to each article of

(12) Similarly, the Conference of States Parties under the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Dumping Convention)[462] has adopted resolutions interpreting that Convention. The IMO Sub-Division for Legal Affairs, upon a request from the governing bodies, opined as follows in relation to an "interpretative resolution" of the Conference of States Parties under the London Dumping Convention:

> "According to article 31 (3) (a) of the Vienna Convention on the Law of Treaties … subsequent agreements between the Parties shall be taken into account in the interpretation of a treaty. The article does not provide for a specific form of the subsequent agreement containing such interpretation. This seems to indicate that, provided its intention is clear, the interpretation could take various forms, including a resolution adopted at a meeting of the Parties, or even a decision recorded in the summary records of a meeting of the Parties."[463]

(13) In a similar vein, the World Health Organization (WHO) Legal Counsel has stated in general terms that:

> "Decisions of the Conference of the Parties, as the supreme body comprising all Parties to the FCTC, undoubtedly represent a 'subsequent agreement between the Parties regarding the interpretation of the treaty,' as stated in Article 31 of the Vienna Convention."[464]

(14) Commentators have also viewed decisions of Conferences of States Parties as being capable of embodying subsequent agreements[465] and have observed that:

> "Such declarations are not legally binding in and of themselves, but they may have juridical significance, especially as a source of authoritative interpretations of the treaty."[466]

(15) The International Court of Justice has held with respect to the role of the International Whaling Commission under the International Convention for the Regulation of Whaling:

> "Article VI of the Convention states that '[t]he Commission may from time to time make recommendations to any or all Contracting Governments on any matters which relate to whales or whaling and to the objectives and purposes of this Convention'. These recommendations, which take the form of resolutions, are not binding. However, when they are adopted by consensus or by a unanimous vote, they may be relevant for the interpretation of the Convention or its Schedule."[467]

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the Convention" (BWC/CONF.VII/INF.5) (updated later to include the understandings and agreements reached by that Conference, Geneva, 2012).

[462] United Nations, *Treaty Series*, vol. 1046, No. 15749, p. 120.

[463] Agenda item 4 (Ocean fertilization), submitted by the Secretariat on procedural requirements in relation to a decision on an interpretive resolution: views of the IMO Sub-Division of Legal Affairs, document LC 33/J/6, para. 3.

[464] See Conference of the Parties to the World Health Organization Framework Convention on Tobacco Control, Intergovernmental Negotiating Body on a Protocol on Illicit Trade in Tobacco Products, "Revised Chairperson's text on a protocol on illicit trade in tobacco products, and general debate: legal advice on the scope of the protocol", note by the WHO Legal Counsel on scope of the protocol on illicit trade in tobacco products (FCTC/COP/INB-IT/3/INF.DOC./6) annex, para. 8; S.F. Halabi, "The World Health Organization's Framework Convention on Tobacco Control: an analysis of guidelines adopted by the Conference of the Parties", *Georgia Journal of International and Comparative Law*, vol. 39 (2010), pp. 121–183.

[465] D.H. Joyner, *Interpreting the Nuclear Non-Proliferation Treaty* (Oxford, Oxford University Press, 2011), p. 83 (with respect to the Non-Proliferation Treaty); Aust, *Modern Treaty Law and Practice* (see footnote 134 above), pp. 213–214.

[466] B.M. Carnahan, "Treaty review conferences", *American Journal of International Law*, vol. 81, No. 1 (1987), pp. 226–230, at p. 229.

[467] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226, at p. 248, para. 46.

(16) The following examples from the practice of Conferences of States Parties support the proposition that decisions by such Conferences may embody subsequent agreements under article 31, paragraph 3 (a).

(17) Article I, paragraph 1, of the Biological Weapons Convention provides that States parties undertake never in any circumstances to develop, produce, stockpile or otherwise acquire or retain:

> "microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes."

(18) At the third Review Conference (1991), States parties specified that the prohibitions established in this provision relate to "microbial or other biological agents or toxins harmful to plants and animals, as well as humans".[468]

(19) Article 4, paragraph 9, of the Montreal Protocol on Substances that Deplete the Ozone Layer[469] has given rise to a debate about the definition of its term "State not party to this Protocol". According to Article 4, paragraph 9:

> "For the purposes of this Article, the term 'State not party to this Protocol' shall include, with respect to a particular controlled substance, a State or regional economic integration organization that has not agreed to be bound by the control measures in effect for that substance."

(20) In the case of hydro chlorofluorocarbons, two relevant amendments to the Montreal Protocol[470] impose obligations that raised the question of whether a State, in order to be "not party to this Protocol", has to be a non-party with respect to both amendments. The Meeting of the Parties decided that:

> "The term 'State not party to this Protocol' includes all other States and regional economic integration organizations that have not agreed to be bound by the Copenhagen and Beijing Amendments."[471]

(21) Whereas the acts that are the result of a tacit acceptance procedure[472] are not, as such, subsequent agreements by the parties under article 31, paragraph 3 (a), they can, in addition

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[468] Final Declaration of the Third Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Geneva, 9–27 September 1991 (BWC/CONF.III/23, part II).

[469] United Nations, *Treaty Series*, vol. 1522, No. 26369, p. 3.

[470] Copenhagen Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer (1992), United Nations, *Treaty Series*, vol. 1785, No. 26369, p. 517; and Beijing Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer (1999), *ibid.*, vol. 2173, No. 26369, p. 183.

[471] For details, see decision XV/3 on obligations of parties to the 1999 Beijing Amendment under art. 4 of the Montreal Protocol with respect to hydrochlorofluorocarbons; the definition itself is formulated as follows: "… (a) The term 'State not party to this Protocol' in article 4, paragraph 9, does not apply to those States operating under article 5, paragraph 1, of the Protocol until January 1, 2016 when, in accordance with the Copenhagen and Beijing Amendments, hydrochlorofluorocarbon production and consumption control measures will be in effect for States that operate under article 5, paragraph 1, of the Protocol; (b) The term 'State not party to this Protocol' includes all other States and regional economic integration organizations that have not agreed to be bound by the Copenhagen and Beijing Amendments; (c) Recognizing, however, the practical difficulties imposed by the timing associated with the adoption of the foregoing interpretation of the term 'State not party to this Protocol,' paragraph 1 (b) shall apply unless such a State has by 31 March 2004: (i) Notified the Secretariat that it intends to ratify, accede or accept the Beijing Amendment as soon as possible; (ii) Certified that it is in full compliance with articles 2, 2A to 2G and article 4 of the Protocol, as amended by the Copenhagen Amendment; (iii) Submitted data on (i) and (ii) above to the Secretariat, to be updated on 31 March 2005, in which case that State shall fall outside the definition of 'State not party to this Protocol' until the conclusion of the Seventeenth Meeting of the Parties" (Report of the 15th meeting of the State Parties to the Montreal Protocol on Substances that deplete the Ozone Layer (UNEP/OzL.Pro.15/9), chap. XVIII. sect. A, decision XV/3, para. 1).

[472] See above para. (8) of the present commentary.

to their primary effect under the treaty, under certain circumstances imply such a subsequent agreement. One example concerns certain decisions of the Conference of the Parties to the London Dumping Convention. At its sixteenth meeting, held in 1993, the Consultative Meeting of Contracting Parties adopted three amendments to annex I by way of the tacit acceptance procedure provided for in the Convention.[473] As such, these amendments were not subsequent agreements. They did, however, also imply a wide-ranging interpretation of the underlying treaty itself.[474] The amendment refers to and builds on a resolution that was adopted by the Consultative Meeting held three years earlier, which had established the agreement of the parties that: "The London Dumping Convention is the appropriate body to address the issue of low-level radioactive waste disposal into sub-seabed repositories accessed from the sea."[475] The resolution has been described as "effectively expand[ing] the definition of 'dumping' under the Convention by deciding that this term covers the disposal of waste into or under the seabed from the sea but not from land by tunnelling".[476] Thus, the amendment confirmed that the interpretative resolution contained a subsequent agreement regarding the interpretation of the treaty.

(22) The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal[477] provides in Article 17, paragraph 5, that: "Amendments … shall enter into force between Parties having accepted them on the ninetieth day after the receipt by the Depositary of their instrument of ratification, approval, formal confirmation or acceptance by at least three-fourths of the Parties who accepted [them] …". Led by an Indonesian-Swiss initiative, the Conference of the Parties decided to clarify the requirement of the acceptance by three fourths of the Parties, by agreeing:

> "… without prejudice to any other multilateral environmental agreement, that the meaning of paragraph 5 of Article 17 of the Basel Convention should be interpreted to mean that the acceptance of three-fourths of those parties that were parties at the time of the adoption of the amendment is required for the entry into force of such amendment, noting that such an interpretation of paragraph 5 of Article 17 does not compel any party to ratify the Ban Amendment."[478]

The parties adopted this decision on the interpretation of article 17, paragraph 5, by consensus, with many States Parties underlining that the Conferences of States Parties to any convention are "the ultimate authority as to its interpretation".[479] While this suggests that the decision embodies a subsequent agreement of the parties under article 31, paragraph 3 (a), the decision was taken after a debate about whether a formal amendment of the Convention was necessary to achieve this result.[480] It should also be noted that the delegation of Japan, requesting that this position be reflected in the Conference's Report, stated that it "supported the current-time approach to the interpretation of the provision of the Convention regarding entry into force of amendments, as described in a legal advice provided by the United Nations Office of Legal Affairs as the Depositary,[481] and had accepted the fixed-time approach enunciated in the decision on the Indonesian-Swiss country-led initiative *only in this particular instance*."[482]

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[473] See London Sixteenth Consultative Meeting of the Contracting Parties, and resolutions LC.49 (16), LC.50 (16) and LC.51 (16) (United Nations, *Treaties Series*, vol. 1775, No. 15749, p. 395). First, the meeting decided to amend the phasing-out of the dumping of industrial waste by 31 December 1995. Second, it banned the incineration at sea of industrial waste and sewage sludge. And, finally, it decided to replace para. 6 of annex I, banning the dumping of radioactive waste or other radioactive matter (see also "Dumping at sea: the evolution of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (LC), 1972", *Focus on IMO* (July 1997), p. 11).

[474] It has even been asserted that these amendments to annex I of the London Dumping Convention "constitute major changes in the Convention" (see Churchill and Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreements …" (footnote 445 above), p. 638).

[475] IMO, Report of the Thirteenth Consultative Meeting of Contracting Parties to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, LDC 13/15, annex 7, resolution LDC.41 (13), para. 1.

[476] Churchill and Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreements …" (see footnote 445 above), p. 641.

[477] United Nations, *Treaty Series*, vol. 1673, No. 28911, p. 57.

[478] See Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal on its tenth meeting (Cartagena, Colombia, 17-21 October 2011), UNEP/CHW.10/28, annex 1, Decision BC-10/3 (Indonesian-Swiss country-led initiative to improve the effectiveness of the Basel Convention), para. 2.

[479] *Ibid.*, chap. III. A, para. 65

(23) The preceding examples demonstrate that decisions of Conferences of States Parties may embody under certain circumstances subsequent agreements under article 31, paragraph 3 (a), and give rise to subsequent practice under articles 31, paragraph 3 (b), or to other subsequent practice under article 32 if they do not reflect agreement of the parties. The respective character of a decision of a Conference of States Parties, however, must always be carefully identified. For this purpose, the specificity and the clarity of the terms chosen in the light of the text of the Conference of States Parties' decision as a whole, its object and purpose, and the way in which it is applied, need to be taken into account. The parties often do not intend that such a decision has any particular legal significance.

Paragraph 2, third sentence — decisions as possibly providing a range of practical options

(24) The last sentence of paragraph 2 of draft conclusion 11 reminds the interpreter that decisions of Conferences of States Parties often provide a range of practical options for implementing the treaty. Those decisions may not necessarily embody a subsequent agreement or subsequent practice for the purpose of treaty interpretation, even if the decision is adopted by consensus. Indeed, Conferences of States Parties often do not explicitly seek to resolve or address questions of interpretation of a treaty.

(25) A decision by the Conference of States Parties to the WHO Framework Convention on Tobacco Control provides an example. Articles 9 and 10 of the Convention deal, respectively, with the regulation of the contents of tobacco products, and with the regulation of the disclosure of information regarding the contents of such products. Acknowledging that such measures require the allocation of significant financial resources, the States Parties agreed, under the title of "practical considerations" for the implementation of articles 9 and 10, on "some options that Parties could consider using", such as:

"(a) designated tobacco taxes;

(b) tobacco manufacturing and/or importing licensing fees;

(c) tobacco product registration fees;

(d) licensing of tobacco distributors and/or retailers;

(e) non-compliance fees levied on the tobacco industry and retailers; and

(f) annual tobacco surveillance fees (tobacco industry and retailers)."[483]

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[480] See Günther Handl, "International 'lawmaking' by conferences of the parties and other politically mandated bodies", in Wolfrum and Röben, *Developments of International Law in Treaty Making* (footnote 455 above), pp. 127–143, at p. 132.

[481] The "current-time approach" favoured by the Legal Counsel of the United Nations stipulates that: "Where the treaty is silent or ambiguous on the matter, the practice of the Secretary-General is to calculate the number of acceptances on the basis of the number of parties to the treaty at the time of deposit of each instrument of acceptance of an amendment." See extracts from the memorandum of 8 March 2004 received from the Office of Legal Affairs of the United Nations, available at www.basel.int/TheConvention/Overview/Amendments/Background/tabid/2760/Default.aspx.

[482] Report of the Conference of the Parties to the Basel Convention … (see footnote 478 above), para. 68 (emphasis added).

[483] Partial guidelines for implementation of articles 9 and 10 of the WHO Framework Convention on Tobacco Control (*Regulation of the contents of tobacco products and Regulation of tobacco product disclosures*), FCTC/COP4(10), Annex, adopted at the fourth session of the Conference of the Parties

This decision provides a non-exhaustive range of practical options for implementing articles 9 and 10 of the Convention. The parties have thereby, however, implicitly agreed that the stated "options" would, as such, be compatible with the Convention.

Paragraph 2 as a whole

(26) It follows that decisions of Conferences of States Parties may have different legal effects. Such decisions are often not intended to embody a subsequent agreement under article 31, paragraph 3 (a), by themselves because they are not meant to be a statement regarding the interpretation of the treaty. In other cases, the parties have made it sufficiently clear that the Conference of State Parties decision embodies their agreement regarding the interpretation of the treaty. They may also produce an effect in combination with a legal duty to cooperate under the treaty, "and the parties thus should give due regard" to such a decision.[484] In any case, it cannot simply be said that because the treaty does not accord the Conference of States Parties a competence to take legally binding decisions, their decisions are necessarily legally irrelevant and constitute only political commitments.[485]

(27) Ultimately, the effect of a decision of a Conference of States Parties depends on the circumstances of each particular case and such decisions need to be properly interpreted. A relevant consideration may be whether States parties uniformly or without challenge apply the treaty as interpreted by the Conference of States Parties' decision. Discordant practice following a decision of the Conference of States Parties may be an indication that States did not assume that the decision would be a subsequent agreement under article 31, paragraph 3 (a).[486] Conference of States Parties' decisions that do not qualify as subsequent agreements under article 31, paragraph 3 (a), or as subsequent practice under article 31, paragraph 3 (b), may nevertheless be a subsidiary means of interpretation under article 32.[487]

Paragraph 3 — an agreement regarding the interpretation of the treaty

(28) Paragraph 3 sets forth the principle that agreements regarding the interpretation of a treaty under article 31, paragraph 3, must relate to the content of the treaty. Thus, what is important is the substance of the agreement embodied in the decision of the Conference of States Parties and not the form or procedure by which that decision is reached. Acts that originate from Conferences of States Parties may have different forms and designations and they may be the result of different procedures. Conferences of States Parties may even operate without formally adopted rules of procedure.[488] If the decision of the Conference of States Parties is based on a unanimous vote in which all parties participate, it may clearly

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to the WHO Framework Convention on Tobacco Control (Punta del Este, Uruguay, 15–20 November 2010), in FCTC/COP/4/DIV/6, p. 39.

[484] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226, at p. 257, para. 83.

[485] *Ibid.*, p. 248, para. 46.

[486] See above commentary to draft conclusion 10, paras. (23)–(24).

[487] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226 (Separate Opinion of Judge *ad hoc* Charlesworth, at p. 454, para. 4: "I note that resolutions adopted by a vote of the [International Whaling Commission] have some consequence although they do not come within the terms of [a]rticle 31.3 of the Vienna Convention").

[488] The Conference of States Parties to the United Nations Framework Convention on Climate Change provisionally applies the draft rules of procedure of the Conference of the Parties and its subsidiaries bodies (FCCC/CP/1996/2), with the exception of draft rule 42 in the chapter on "Voting", since no agreement has been reached so far on one of the two voting alternatives contained therein, see Report of the Conference of the Parties on its first session (28 March to 7 April 1995) (FCCC/CP/1995/7), p. 8, para. 10; Report of the Conference of the Parties on its nineteenth session (11 to 23 November 2013) (FCCC/CP/2013/10), p. 6, para. 4; similarly, the Conference of States Parties to the Convention on Biological Diversity (1992, United Nations, *Treaties Series*, vol. 1760, No. 30619, p. 79) did not adopt Rule 40, paragraph 1 (Voting), of the rules of procedure "because of the lack of consensus among the Parties concerning the majority required for decision-making on matters of substance", see Report of the Eleventh Meeting of the Conference of the Parties to the Convention on Biological Diversity (8–19 October 2012) (UNEP/CBD/COP/11/35), para. 65.

embody a "subsequent agreement" under article 31, paragraph 3 (a), provided that it is "regarding the interpretation of the treaty".

(29) Conference of States Parties' decisions regarding review and implementation functions, however, are normally adopted by consensus. This practice derives from rules of procedure that usually require States parties to make every effort to achieve consensus on substantive matters. An early example can be found in the Provisional Rules of Procedure for the Review Conference of the Parties to the Biological Weapons Convention. According to rule 28, paragraph 2:

> "The task of the Review Conference being to review the operation of the Convention with a view to assuring that the purposes of the preamble and the provisions of the Convention are being realized, and thus to strengthen its effectiveness, every effort should be made to reach agreement on substantive matters by means of consensus. There should be no voting on such matters until all efforts to achieve consensus have been exhausted."[489]

This formula, with only minor variations, has become the standard with regard to substantive decision-making procedures at Conferences of States Parties.

(30) In order to address concerns relating to decisions adopted by consensus, the phrase "including adoption by consensus" was introduced at the end of paragraph 3 in order to dispel the notion that a decision adopted by consensus would necessarily be equated with agreement in substance. Indeed, consensus is not a concept that necessarily indicates any particular degree of agreement on substance. According to the *Comments on Some Procedural Questions* issued by the Office of Legal Affairs of the United Nations Secretariat in accordance with General Assembly resolution 60/286 of 8 September 2006:[490]

> "Consensus is generally understood as a decision-taking process consisting in arriving at a decision without formal objections and vote. It may however not necessarily reflect 'unanimity' of opinion on the substantive matter. It is used to describe the practice under which every effort is made to achieve general agreement and no delegation objects explicitly to a consensus being recorded."[491]

(31) It follows that adoption by consensus is not a sufficient condition for an agreement under article 31, paragraph 3 (a) or (b) to be established. The rules of procedure of Conferences of States Parties do not usually give an indication of the possible legal effect of a resolution as a subsequent agreement under article 31, paragraph 3 (a), or a subsequent practice under article 31, paragraph 3 (b). Such rules of procedure only determine how the Conference of States Parties shall adopt its decisions, not their possible legal effect as a subsequent agreement under article 31, paragraph 3. Although subsequent agreements under article 31, paragraph 3 (a), need not be binding as such, the 1969 Vienna Convention attributes them a legal effect under article 31 only if there exists agreement in substance among the parties concerning the interpretation of a treaty. The International Court of Justice has confirmed that the distinction between the form of a collective decision and the agreement in substance is pertinent in such a context.[492]

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[489] See rule 28, paragraph 2, of the provisional rules of procedure for the Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, held in Geneva, from 3 to 21 March 1980 (BWC/CONF.I/2).

[490] See General Assembly resolution 60/286 of 8 September 2006 on revitalization of the General Assembly, requesting the Office of Legal Affairs of the Secretariat "to make precedents and past practice available in the public domain with respect to rules and practices of the intergovernmental bodies of the Organization" (annex, para. 24).

[491] See "Consensus in UN practice: General", paper prepared by the Secretariat, available from http://legal.un.org/ola/media/GA_RoP/GA_RoP_EN.pdf; see also R. Wolfrum and J. Pichon, "Consensus", in *Max Planck Encyclopedia of Public International Law* (www.mpepil.com), paras. 3–4 and 24.

[492] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226, at p. 257, para. 83.

(32) That certain decisions, despite having been adopted by consensus, cannot represent a subsequent agreement under article 31, paragraph 3 (a), is especially true when there exists an objection by one or more States parties to that consensus.

(33) For example, at its Sixth Meeting in 2002, the Conference of States Parties to the Convention on Biological Diversity worked on formulating guiding principles for the prevention, introduction and mitigation of impacts of alien species that threaten ecosystems, habitats or species.[493] After several efforts to reach an agreement had failed, the President of the Conference of States Parties proposed that the decision be adopted and the reservations that Australia had raised be recorded in the final report of the meeting. The representative of Australia, however, reiterated that the guiding principles could not be accepted and that "his formal objection therefore stood".[494] The President declared the debate closed and, "following established practice", declared the decision adopted without a vote, clarifying that the objections of the dissenting States would be reflected in the final report of the meeting. Following the adoption, Australia reiterated its view that consensus is adoption without formal objection and expressed concerns about the legality of the adoption of the draft decision. As a result, a footnote to decision VI/23 indicates that "one representative entered a formal objection during the process leading to the adoption of this decision and underlined that he did not believe that the Conference of the Parties could legitimately adopt a motion or a text with a formal objection in place".[495]

(34) In this situation, the Executive Secretary of the Convention on Biological Diversity requested a legal opinion from the United Nations Legal Counsel.[496] The opinion by the Legal Counsel[497] expressed the view that a party could "disassociate itself from the substance or text … of the document [,] indicate that its joining in the consensus does not constitute acceptance of the substance or text of parts of the document[,] and/or present any other restrictions on its Government's position on substance or text of … the document".[498] Thus, it is clear that a decision that was adopted by consensus can occur in the face of rejection of the substance of the decision by one or more of the States parties.

(35) The decision under the Convention on Biological Diversity, as well as a similar decision reached in Cancún in 2010 by the Meeting of the Parties to the Kyoto Protocol to the Climate Change Convention (Bolivia's objection notwithstanding),[499] raise the important question of what "consensus" means.[500] However, this question, which does not fall within the scope of the present topic, must be distinguished from the question of whether all the parties to a treaty have arrived at an agreement in substance on matters of interpretation of that treaty under article 31, paragraph 3 (a) and (b). Decisions by Conferences of States Parties that do not reflect agreement in substance among all the parties do not qualify as agreements under article 31, paragraph 3, although they may be a form of "other subsequent practice" under article 32 (see draft conclusion 4, paragraph 3).

(36) A different issue concerns the legal effect of a decision of a Conference of States Parties once it qualifies as an agreement under article 31, paragraph (3). In 2011, the IMO

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[493] See report of the sixth meeting of the Conference of the Parties to the Convention on Biological Diversity (UNEP/CBD/COP/6/20), annex I, decision VI/23.

[494] *Ibid.*, para. 313.

[495] *Ibid.*, para. 318; for the discussion see paras. 294–324.

[496] Available from the secretariat of the Convention on Biological Diversity, document SCBD/SEL/DBO/30219 (6 June 2002).

[497] Letter dated 17 June 2002, transmitted by facsimile.

[498] *Ibid.*

[499] See report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its sixth session, held in Cancún from 29 November to 10 December 2010 (FCCC/KP/CMP/2010/12 and Add.1), decision 1/CMP.6 (The Cancún Agreements: outcome of the work of the Ad hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol at its fifteenth session) and decision 2/CMP.6 (The Cancún Agreements: land use, land-use change and forestry); as well as the proceedings of the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol, para. 29.

[500] See Nolte, "Subsequent agreements and subsequent practice of States …" (footnote 48 above), pp. 372–377.

Sub-Division for Legal Affairs was asked to "advise the governing bodies […] about the procedural requirements in relation to a decision on an interpretative resolution and, in particular, whether or not consensus would be needed for such a decision".[501] In its response, while confirming that a resolution by the Conference of States Parties can constitute, in principle, a subsequent agreement under article 31, paragraph 3 (a), the IMO Sub-Division for Legal Affairs advised the governing bodies that even if the Conference were to adopt a decision based on consensus, that would not mean that the decision would be binding on all the parties.[502]

(37) Although the opinion of the IMO Sub-Division for Legal Affairs proceeded from the erroneous assumption that a "subsequent agreement" under article 31, paragraph 3 (a), would only be binding "as a treaty, or an amendment thereto",[503] it came to the correct conclusion that even if the consensus decision by a Conference of States Parties embodies an agreement regarding interpretation in substance it is not (necessarily) binding upon the parties.[504] Rather, as the Commission has indicated, a subsequent agreement under article 31, paragraph 3 (a), is only one of different means of interpretation to be taken into account in the process of interpretation.[505]

(38) Thus, interpretative resolutions by Conferences of States Parties that are adopted by consensus, even if they are not binding as such, can nevertheless be subsequent agreements under article 31, paragraph 3 (a), or subsequent practice under article 31, paragraph 3 (b), if there are sufficient indications that that was the intention of the parties at the time of the adoption of the decision or if the subsequent practice of the parties establishes an agreement on the interpretation of the treaty.[506] The interpreter must give appropriate weight to such an interpretative resolution under article 31, paragraph 3 (a), but not necessarily treat it as legally binding.[507]

Conclusion 12
Constituent instruments of international organizations

1. Articles 31 and 32 apply to a treaty which is the constituent instrument of an international organization. Accordingly, subsequent agreements and subsequent practice under article 31, paragraph 3, are, and subsequent practice under article 32 may be, means of interpretation for such treaties.

2. Subsequent agreements and subsequent practice of the parties under article 31, paragraph 3, or subsequent practice under article 32, may arise from, or be expressed in, the practice of an international organization in the application of its constituent instrument.

3. Practice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31 and 32.

4. Paragraphs 1 to 3 apply to the interpretation of any treaty which is the constituent instrument of an international organization without prejudice to any relevant rules of the organization.

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[501] IMO, report of the 3rd meeting of the Intersessional Working Group on Ocean Fertilization (LC 33/4), para. 4.15.2.

[502] IMO, document LC 33/J/6 (see footnote 463 above), para. 3.

[503] *Ibid.*, para. 8.

[504] See above commentary to draft conclusion 10, paras. (9)–(11).

[505] Commentary to draft conclusion 3, para. (4), above.

[506] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226, Separate Opinion of Judge Greenwood, at pp. 407–408, para. 6, and Separate Opinion of Judge *ad hoc* Charlesworth, at pp. 453–454, para. 4.

[507] See above commentary to draft conclusion 3, para. 4.

Commentary

General aspects

(1) Draft conclusion 12 refers to a particular type of treaty, namely constituent instruments of international organizations, and the way in which subsequent agreements or subsequent practice shall or may be taken into account in their interpretation under articles 31 and 32 of the 1969 Vienna Convention.

(2) Constituent instruments of international organizations are specifically addressed in article 5 of the 1969 Vienna Convention, which provides:

> "The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization."[508]

(3) A constituent instrument of an international organization under article 5, like any treaty, is an international agreement "whether embodied in a single instrument or in two or more related instruments" (article 2, paragraph 1 (a)). The provisions that are contained in such a treaty are part of the constituent instrument.[509]

(4) As a general matter, article 5, by stating that the 1969 Vienna Convention applies to constituent instruments of international organizations without prejudice to any relevant rules of the organization,[510] follows the general approach of the Convention according to which treaties between States are subject to the rules set forth in the Convention "unless the treaty otherwise provides."[511]

(5) Draft conclusion 12 only refers to the interpretation of constituent instruments of international organizations. It therefore does not address every aspect of the role of subsequent agreements and subsequent practice in relation to the interpretation of treaties involving international organizations. In particular, it does not apply to the interpretation of treaties adopted within an international organization or to treaties concluded by international organizations that are not themselves constituent instruments of international organizations.[512] In addition, draft conclusion 12 does not apply to the interpretation of decisions by organs of international organizations as such,[513] including to the interpretation of decisions by international courts[514] or to the effect of a "clear and constant

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[508] See also the parallel provision of article 5 of the 1986 Vienna Convention (A/CONF.129/15).

[509] Art. 20, para. 3, of the 1969 Vienna Convention requires the acceptance, by the competent organ of the organization, of reservations relating to its constituent instrument. Twelfth report on reservations to treaties, *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/584, paras. 75–77; S. Rosenne, *Developments in the Law of Treaties 1945-1986* (Cambridge, Cambridge University Press, 1989), p. 204.

[510] See *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 191 (draft article 4); K. Schmalenbach, "Art. 5", in Dörr and Schmalenbach, *Vienna Convention on the Law of Treaties ...* (see footnote 47 above), p. 89, para. 1.

[511] See, for example, articles 16; 19 (a) and (b); 20, paras. 1 and 3–5; 22; 24, para. 3; 25, para. 2; 44, para. 1; 55; 58, para. 2; 70, para. 1; 72, para. 1; 77, para. 1, of the 1969 Vienna Convention.

[512] The latter category is addressed by the 1986 Vienna Convention (A/CONF.129/15).

[513] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403, at p. 442, para. 94 ("… While the rules on treaty interpretation embodied in [a]rticles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also require that other factors be taken into account"); see also H. Thirlway, "The law and procedure of the International Court of Justice 1960-1989, part eight", *British Yearbook of International Law 1996*, vol. 67, p. 1, at p. 29; M.C. Wood, "The interpretation of Security Council resolutions", *Max Planck Yearbook of United Nations Law*, vol. 2 (1998), p. 73, at p. 85; Gardiner, *Treaty Interpretation* (see footnote 5 above), p. 128.

[514] *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Judgment, I.C.J. Reports 2013*, p. 281, at p. 307, para. 75 ("A judgment of the Court cannot be equated to a treaty, an instrument which derives its binding force and content from the consent of the contracting States and the interpretation of which may be affected by

jurisprudence"[515] ("*jurisprudence constante*") of courts or tribunals.[516] Finally, the conclusion does not specifically address questions relating to pronouncements by a treaty monitoring body consisting of independent experts. The latter are addressed in draft conclusion 13.

Paragraph 1 — applicability of articles 31 and 32

(6) The first sentence of paragraph 1 of draft conclusion 12 recognizes the applicability of articles 31 and 32 of the 1969 Vienna Convention to treaties that are constituent instruments of international organizations.[517] The International Court of Justice has confirmed this point in its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*:

> "From a formal standpoint, the constituent instruments of international organizations are multilateral treaties, to which the well-established rules of treaty interpretation apply."[518]

(7) The Court has held with respect to the Charter of the United Nations:

> "On the previous occasions when the Court has had to interpret the Charter of the United Nations, it has followed the principles and rules applicable in general to the interpretation of treaties, since it has recognized that the Charter is a multilateral treaty, albeit a treaty having certain special characteristics."[519]

(8) At the same time, article 5 suggests, and decisions by international courts confirm, that constituent instruments of international organizations are also treaties of a particular type that may need to be interpreted in a specific way. Accordingly, the International Court of Justice has stated:

> "But the constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation owing, *inter alia*, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties."[520]

(9) The second sentence of paragraph 1 of draft conclusion 12 more specifically refers to elements of articles 31 and 32 that deal with subsequent agreements and subsequent practice as means of interpretation and confirms that subsequent agreements and subsequent practice under article 31, paragraph 3, are, and other subsequent practice under article 32 may be, means of interpretation for constituent instruments of international organizations.

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the subsequent conduct of those States, as provided by the principle stated in article 31, paragraph 3 (*b*), of the 1969 Vienna Convention on the Law of Treaties").

[515] See *Regina v. Secretary of State for the Environment, Transport and the Regions ex parte Alconbury Developments Limited and others* [2001] UKHL 23; *Regina v. Special Adjudicator (respondent) ex parte Ullah (FC) (appellant) Do (FC) (appellant) v. Secretary of State for the Home Department (Respondent)* [2004] UKHL 26 [20] (Lord Bingham of Cornhill); *Regina (On the Application of Animal Defenders International) v. Secretary of State for Culture, Media and Sport* [2008] UKHL 15.

[516] Such jurisprudence may be a means for the determination of rules of law as indicated, in particular, by article 38, paragraph 1 (d), of the Statute of the International Court of Justice.

[517] Gardiner, *Treaty Interpretation* (see footnote 5 above), pp. 281–282.

[518] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66, at p. 74, para. 19.

[519] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 151, at p. 157.

[520] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66, at p. 75, para. 19.

(10) The International Court of Justice has recognized that article 31, paragraph 3 (b), is applicable to constituent instruments of international organizations. In its Advisory Opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, after describing constituent instruments of international organizations as being treaties of a particular type, the Court introduced its interpretation of the Constitution of WHO by stating:

> "According to the customary rule of interpretation as expressed in Article 31 of the 1969 Vienna Convention on the Law of Treaties, the terms of a treaty must be interpreted 'in their context and in the light of its object and purpose' and there shall be 'taken into account, together with the context:
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> ...
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> "'(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'."[521]

Referring to different precedents from its own case law in which it had, *inter alia*, employed subsequent practice under article 31, paragraph 3 (b), as a means of interpretation, the Court announced that it would apply article 31, paragraph 3 (b):

> "... in this case for the purpose of determining whether, according to the WHO Constitution, the question to which it has been asked to reply arises 'within the scope of [the] activities' of that Organization."[522]

(11) The *Land and Maritime Boundary between Cameroon and Nigeria* case is another decision in which the Court has emphasized, in a case involving the interpretation of a constituent instrument of an international organization,[523] the subsequent practice of the parties. Proceeding from the observation that "Member States have also entrusted to the Commission certain tasks that had not originally been provided for in the treaty texts",[524] the Court concluded that:

> "From the treaty texts and the practice [of the parties] analysed at paragraphs 64 and 65 above, it emerges that the Lake Chad Basin Commission is an international organization exercising its powers within a specific geographical area; that it does not however have as its purpose the settlement at a regional level of matters relating to the maintenance of international peace and security and thus does not fall under Chapter VIII of the Charter."[525]

(12) Article 31, paragraph 3 (a), is also applicable to constituent treaties of international organizations.[526] Self-standing subsequent agreements between the member States regarding the interpretation of constituent instruments of international organizations, however, are not common. When questions of interpretation arise with respect to such an instrument, the parties mostly act as members within the framework of the plenary organ of the organization. If there is a need to modify, to amend, or to supplement the treaty, the member States either use the amendment procedure that is provided for in the treaty or they conclude a further treaty, usually a protocol.[527] It is, however, also possible that the parties act as such when they meet within a plenary organ of the respective organization. In 1995:

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[521] *Ibid.*

[522] *Ibid.*

[523] See Art. 17 of the Convention and Statute relating to the Development of the Chad Basin (Treaty of Fort-Lamy von 1964), *Heidelberg Journal of International Law*, vol. 34 (1974), p. 80; generally: P.H. Sand, "Development of International Water Law in the Lake Chad Basin", *ibid.*, pp. 52–76.

[524] *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, at p. 305, para. 65.

[525] *Ibid.*, pp. 306–307, para. 67.

[526] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226; see also below footnote 554 and accompanying text.

[527] See articles 39–41 of the 1969 Vienna Convention.

> "The Governments of the 15 Member States [of the European Union] have achieved the common agreement that this decision is the agreed and definitive interpretation of the relevant Treaty provisions".[528]

That is to say that:

> "... the name given to the European currency shall be Euro. ... The specific name Euro will be used instead of the generic term 'ecu' used by the Treaty to refer to the European currency unit."[529]

This decision of the "Member States meeting within" the European Union has been regarded, in the literature, as a subsequent agreement under article 31, paragraph 3 (a).[530]

(13) It is sometimes difficult to determine whether "Member States meeting within" a plenary organ of an international organization intend to act in their capacity as members of that organ, as they usually do, or whether they intend to act in their independent capacity as States parties to the constituent instrument of the organization.[531] The Court of Justice of the European Union, when confronted with this question, initially proceeded from the wording of the act in question:

> "It is clear from the wording of that provision that acts adopted by representatives of the Member States acting, not in their capacity as members of the Council, but as representatives of their governments, and thus collectively exercising the powers of the Member States, are not subject to judicial review by the Court."[532]

Later, however, the Court accorded decisive importance to the "content and all the circumstances in which [the decision] was adopted" in order to determine whether the decision was that of the organ or of the member States themselves as parties to the treaty:

> "Consequently, it is not enough that an act should be described as a 'decision of the Member States' for it to be excluded from review under Article 173 of the Treaty. In order for such an act to be excluded from review, it must still be determined whether, having regard to its content and all the circumstances in which it was adopted, the act in question is not in reality a decision of the Council."[533]

(14) Apart from subsequent agreements or subsequent practice that establish the agreement of all the parties under article 31, paragraph 3 (a) and (b), subsequent practice by one or more parties under article 32 in the application of the constituent instrument of an international organization may also be relevant for the interpretation of that treaty.[534] Constituent instruments of international organizations, like other multilateral treaties, are, for example, sometimes implemented by subsequent bilateral or regional agreements or practice.[535] Such bilateral treaties are not, as such, subsequent agreements under article 31, paragraph 3 (a), if only because they are concluded between a limited number of the parties to the multilateral constituent instrument. They may, however, imply assertions concerning

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[528] See Madrid European Council, Conclusions of the Presidency, *European Union Bulletin*, No. 12 (1995), p. 9, at p. 10, sect. I.A.I.

[529] *Ibid.*

[530] See Aust, *Modern Treaty Law and Practice* (footnote 134 above), p. 215; Hafner, "Subsequent agreements and practice ..." (see footnote 265 above), pp. 109–110.

[531] P.C.G. Kapteyn and P. VerLoren van Themaat, *Introduction to the Law of the European Communities*, 3rd edition, L.W. Gormley, ed. (London, Kluwer Law International, 1998), pp. 340–343.

[532] Case C-181/91 and C-248/91, *Parliament v. Council and Commission* [1993], *European Court Reports I-3713*, para. 12.

[533] *Ibid.*, para. 14.

[534] See above draft conclusions 2, para. 4, and 4, para. 3, and commentary thereto, respectively, para. (10) and paras. (23)–(37).

[535] This is true, for example, for the Convention on International Civil Aviation (see footnote 446 above); P.P.C. Haanappel, "Bilateral air transport agreements — 1913-1980", *International Trade Law Journal*, vol. 5, No. 2 (1980), pp. 241–267; L. Tomas, "Air transport agreements, regulation of liability", in *Max Planck Encyclopedia of Public International Law* (see footnote 34 above); B.F. Havel, *Beyond Open Skies, A New Regime for International Aviation* (Alphen aan den Rijn, Kluwer Law International, 2009), p. 10.

the interpretation of the constituent instrument itself and may serve as supplementary means of interpretation under article 32.

Paragraph 2 — subsequent agreements and subsequent practice as "arising from" or "being expressed in" the reaction of States parties

(15) Paragraph 2 of draft conclusion 12 highlights a particular way in which subsequent agreements and subsequent practice of States parties under articles 31, paragraph 3, and 32 may arise or be expressed. Subsequent agreements and subsequent practice of States parties may "arise from" their reactions to the practice of an international organization in the application of a constituent instrument. Alternatively, subsequent agreements and subsequent practice of States parties to a constituent agreement may be "expressed in" the practice of an international organization in the application of its constituent instrument. "Arise from" is intended to encompass the generation and development of subsequent agreements and subsequent practice by States parties, while "expressed in" is used in the sense of reflecting and articulating such agreements and practice. Either variant of the practice in an international organization may reflect subsequent agreements or subsequent practice by the States parties to the constituent instrument of the organization (see draft conclusion 4).[536]

(16) In its Advisory Opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the International Court of Justice recognized the possibility that the practice of an organization may reflect an agreement or the practice of the Member States as parties to the treaty themselves, but found that the practice in that case did not "express or amount to" a subsequent practice under article 31, paragraph 3 (b):

> "Resolution WHA46.40 itself, adopted, not without opposition, as soon as the question of the legality of the use of nuclear weapons was raised at the WHO, could not be taken to express or to amount on its own to a practice establishing an agreement between the members of the Organization to interpret its Constitution as empowering it to address the question of the legality of the use of nuclear weapons."[537]

(17) In this case, when considering the relevance of a resolution of an international organization for the interpretation of its constituent instrument, the Court considered, in the first place, whether the resolution expressed or amounted to "a practice establishing agreement between the members of the Organization" under article 31, paragraph 3 (b).[538]

(18) In a similar way, the WTO Appellate Body has stated in general terms:

> "Based on the text of Article 31 (3) (a) of the *Vienna Convention*, we consider that a decision adopted by Members may qualify as a 'subsequent agreement between the parties' regarding the interpretation of a covered agreement or the application of its provisions if: (i) the decision is, in a temporal sense, adopted subsequent to the relevant covered agreement; and (ii) the terms and content of the decision express an

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[536] R. Higgins, "The Development of international law by the political organs of the United Nations", *Proceedings of the American Society of International Law at its 59th Annual Meeting* (Washington, D.C., April 22–24, 1965), pp. 116–124, at p. 119; the practice of an international organization, in addition to arising from, or being expressed in, an agreement or the practice of the parties themselves under paragraph 2, may also be a means of interpretation in itself under paragraph 3 (see below at paras. (25)–(35)).

[537] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66, at p. 81, para. 27.

[538] The Permanent Court of International Justice had adopted this approach in its Advisory Opinion on *Competence of the International Labour Organization to regulate, incidentally, the personal work of the employer*, 23 July 1926, *P.C.I.J. Series B. No. 13*, at pp. 19–20; see S. Engel, "'Living' international constitutions and the world court (the subsequent practice of international organs under their constituent instruments)", *International and Comparative Law Quarterly*, vol. 16 (1967), pp. 865–910, at p. 871.

> *agreement* between Members on the *interpretation* or *application* of a provision of WTO law."[539]

(19) Regarding the conditions under which a decision of a plenary organ may be considered to be a subsequent agreement under article 31, paragraph 3 (a), the WTO Appellate Body held:

> "263. With regard to the first element, we note that the Doha Ministerial Decision was adopted by consensus on 14 November 2001 on the occasion of the Fourth Ministerial Conference of the WTO. … With regard to the second element, the key question to be answered is whether paragraph 5.2 of the Doha Ministerial Decision expresses an *agreement* between Members on the *interpretation* or *application* of the term 'reasonable interval' in Article 2.12 of the *TBT Agreement*.
>
> "264. We recall that paragraph 5.2 of the Doha Ministerial Decision provides:
>
>> Subject to the conditions specified in paragraph 12 of Article 2 of the Agreement on Technical Barriers to Trade, the phrase 'reasonable interval' shall be understood to mean normally a period of not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued.
>
> "265. In addressing the question of whether paragraph 5.2 of the Doha Ministerial Decision expresses an agreement between Members on the interpretation or application of the term 'reasonable interval' in Article 2.12 of the *TBT Agreement*, we find useful guidance in the Appellate Body reports in *EC — Bananas III (Article 21.5 — Ecuador II)/EC — Bananas III (Article 21.5 — US)*. The Appellate Body observed that the International Law Commission (the 'ILC') describes a subsequent agreement within the meaning of Article 31 (3) (a) of the *Vienna Convention* as 'a further *authentic element of interpretation* to be taken into account together with the context'. According to the Appellate Body, 'by referring to "authentic interpretation", the ILC reads Article 31 (3) (a) as referring to *agreements bearing specifically upon the interpretation of the treaty*.' Thus, we will consider whether paragraph 5.2 bears specifically upon the interpretation of Article 2.12 of the *TBT Agreement*.
>
> …
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> "268. For the foregoing reasons, we *uphold* the Panel's finding … that paragraph 5.2 of the Doha Ministerial Decision constitutes a subsequent agreement between the parties, within the meaning of Article 31 (3) (a) of the *Vienna Convention*, on the interpretation of the term 'reasonable interval' in Article 2.12 of the *TBT Agreement*."[540]

(20) The International Court of Justice, although it did not expressly mention article 31, paragraph 3 (a), when relying on the General Assembly Declaration on Friendly Relations between States for the interpretation of Article 2, paragraph 4, of the Charter, emphasized the "attitude of the Parties and the attitude of States towards certain General Assembly resolutions" and their consent thereto.[541] In this context, a number of writers have

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[539] WTO Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, para. 262 (original emphasis).

[540] *Ibid.* (footnotes omitted); although the Doha Ministerial Decision does not concern a provision of the WTO Agreement itself, it concerns an annex to that Agreement (the "TBT Agreement"), which is an "integral part" of the Agreement establishing the WTO (art. 2, para. 2, WTO Agreement).

[541] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 100, para. 188: "… The effect of consent to the text of such resolutions cannot be understood as merely that of a 'reiteration or elucidation' of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves". This statement, whose primary purpose is to explain the possible role of General Assembly resolutions for the formation of customary law, also recognizes the treaty-related point that such resolutions may serve to express the agreement, or the positions, of the parties regarding a certain interpretation of the

concluded that subsequent agreements within the meaning of article 31, paragraph 3 (a), may, under certain circumstances, arise from or be expressed in acts of plenary organs of international organizations,[542] such as the General Assembly of the United Nations.[543] Indeed, as the WTO Appellate Body has indicated with reference to the Commission,[544] the characterization of a collective decision as an "authentic element of interpretation" under article 31, paragraph 3 (a), is only justified if the parties of the constituent instrument of an international organization acted as such and not, as they usually do, institutionally as members of the respective plenary organ.[545]

(21) Paragraph 2 refers to the practice of an international organization, rather than to the practice of an organ of an international organization. Although the practice of an international organization usually arises from the conduct of an organ, it can also be generated by the conduct of two or more organs.

(22) Subsequent agreements and subsequent practice of the parties, which may "arise from, or be expressed in" the practice of an international organization, may sometimes be very closely interrelated with the practice of the organization as such. For example, in its *Namibia* Advisory Opinion, the International Court of Justice arrived at its interpretation of the term "concurring votes" in Article 27, paragraph 3, of the Charter of the United Nations as including abstentions primarily by relying on the practice of the competent organ of the organization in combination with the fact that this practice was then "generally accepted" by Member States:

Charter of the United Nations as a treaty ("elucidation"); similarly: *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403, at p. 437, para. 80; in this sense, for example, L.B. Sohn, "The UN system as authoritative interpreter of its law", in *United Nations Legal Order*, vol. 1, O. Schachter and C.C. Joyner, eds. (Cambridge, American Society of International Law/Cambridge University Press, 1995), pp. 169–229, at p. 177 (noting in regard to the *Nicaragua* case that "[t]he Court accepted the Friendly Relations Declaration as an authentic interpretation of the Charter").

[542] H.G. Schermers and N.M. Blokker, *International Institutional Law*, 5th revised edition (Leiden/Boston, Martinus Nijhoff, 2011), p. 854 (referring to interpretations by the Assembly of the Oil Pollution Compensation Fund regarding the constituent instruments of the Fund); M. Cogen, "Membership, associate membership and pre-accession arrangements of CERN, ESO, ESA, and EUMETSAT", *International Organizations Law Review*, vol. 9 (2012), pp. 145–179, at pp. 157–158 (referring to a unanimously adopted decision of the CERN Council of 17 June 2010 interpreting the admission criteria established in the CERN Convention as a subsequent agreement under article 31, para. 3 (a), of the 1969 Vienna Convention).

[543] See E. Jimémez de Aréchega, "International law in the past third of a century", *Recueil des Cours … 1978*, vol. 159, pp. 1–334, at p. 32 (stating in relation to the Friendly Relations Declaration that "[t]his Resolution … constitutes an authoritative expression of the views held by the totality of the parties to the Charter as to these basic principles and certain corollaries resulting from them. In the light of these circumstances, it seems difficult to deny the legal weight and authority of the Declaration both as a resolution recognizing what the Members themselves believe constitute existing rules of customary law and as an interpretation of the Charter by the subsequent agreement and the subsequent practice of all its members"); O. Schachter, "General course in public international law", *Recueil des Cours … 1982*, vol. 178, pp. 9–396, at p. 113 ("… [t]he law-declaring resolutions that construed and 'concretized' the principles of the Charter — whether as general rules or in regard to particular cases — may be regarded as authentic interpretation by the parties of their existing treaty obligations. To that extent they were interpretation, and agreed by all Member States, they fitted comfortably into an established source of law."); P. Kunig, "United Nations Charter, interpretation of", in *Max Planck Encyclopedia of Public International Law*, vol. X (www.mpepil.com), pp. 273 *et seq.*, at p. 275 (stating that, "[i]f passed by *consensus*, they [that is, General Assembly resolutions] are able to play a major role in the … interpretation of the UN Charter"); Aust, *Modern Treaty Law and Practice* (see footnote 134 above), p. 213 (mentioning that General Assembly resolution 51/210 on measures to eliminate international terrorism of 17 December 1996 "can be seen as a subsequent agreement about the interpretation of the UN Charter"). All resolutions to which the writers are referring have been adopted by consensus.

[544] WTO Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, para. 265.

[545] Y. Bonzon, *Public Participation and Legitimacy in the WTO* (Cambridge, Cambridge University Press, 2014), pp. 114–115.

> "… the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions. This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by Members of the United Nations and evidences a general practice of that Organization."[546]

In this case, the Court emphasized both the practice of one or more organs of the international organization and the "general acceptance" of that practice by the Member States and characterized the combination of those two elements as being a "general practice of the organization".[547] The Court followed this approach in its Advisory Opinion regarding *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* by stating that:

> "The Court considers that the *accepted* practice of the General Assembly, as it has evolved, is consistent with Article 12, paragraph 1, of the Charter."[548]

By speaking of the "accepted practice of the General Assembly",[549] the Court implicitly affirmed that acquiescence on behalf of the Member States regarding the practice followed by the organization in the application of the treaty permits to establish the agreement regarding the interpretation of the relevant treaty provision.[550] Similarly, the Court of Justice of the European Union, in its judgment *Europäische Schule München*, held that "[t]he case-law of the Complaints Board of the European Schools … should be considered a subsequent practice in the application of the Convention defining the Statute of the European Schools within the meaning of article 31(3)(b) of the Vienna Convention". Since that practice "has never been the subject of challenge by the parties to that convention", "[t]he absence of any challenge by those parties must be regarded as reflecting their tacit agreement to such a practice."[551]

(23) On this basis it is reasonable to consider "that relevant practice will usually be that of those on whom the obligation of performance falls",[552] in the sense that "where [S]tates by treaty entrust the performance of activities to an organization, how those activities are conducted can constitute practice under the treaty; but whether such practice establishes agreement of the parties regarding the treaty's interpretation may require account to be taken of further factors".[553]

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[546] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 22.

[547] H. Thirlway, "The law and procedure of the International Court of Justice 1960-1989, Part Two", *British Yearbook of International Law 1990*, vol. 61, pp. 1–133, at p. 76 (mentioning that "[t]he Court's reference to the practice as being 'of' the Organization is presumably intended to refer, not to a practice followed by the Organization as an entity in its relations with other subjects of international law, but rather a practice followed, approved or respected throughout the Organization. Seen in this light, the practice is … rather a recognition by the other members of the Security Council at the relevant moment, and indeed by all member States by tacit acceptance, of the validity of such resolutions").

[548] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 150 (emphasis added).

[549] *Ibid.*

[550] See above commentary to draft conclusion 10, para. 2, second sentence, paras. (13)–(25); Villiger, *Commentary* ... (see footnote 23 above), pp. 431–432, para. 22; J. Arato, "Treaty interpretation and constitutional transformation", *Yale Journal of International Law*, vol. 38, No. 2 (2013), pp. 289–357, at p. 322.

[551] Judgment of 11 March 2015, Joined Cases C-464/13 and C-465/13, *Europäische Schule München v. Silvana Oberto and Barbara O'Leary* [2015], paras. 65–66.

[552] Gardiner, *Treaty Interpretation* (see footnote 5 above), p. 281.

[553] *Ibid.*

(24) Accordingly, in the *Whaling in the Antarctic* case, the International Court of Justice referred to (non-binding) recommendations of the International Whaling Commission (which is both the name of an international organization established by the Convention for the Regulation of Whaling[554] and that of an organ thereof), and clarified that when such recommendations are "adopted by consensus or by a unanimous vote, they may be relevant for the interpretation of the Convention or its Schedule".[555] At the same time, however, the Court also expressed a cautionary note according to which:

> "… Australia and New Zealand overstate the legal significance of the recommendatory resolutions and Guidelines on which they rely. First, many IWC resolutions were adopted without the support of all States parties to the Convention and, in particular, without the concurrence of Japan. Thus, such instruments cannot be regarded as subsequent agreement to an interpretation of Article VIII, nor as subsequent practice establishing an agreement of the parties regarding the interpretation of the treaty within the meaning of subparagraphs (a) and (b), respectively, of paragraph (3) of Article 31 of the Vienna Convention on the Law of Treaties."[556]

(25) This cautionary note does not, however, exclude that a resolution that has been adopted without the support of all member States may give rise to, or express, the position or the practice of individual member States in the application of the treaty under article 32.[557]

The practice of an international organization itself

(26) Paragraph 3 of draft conclusion 12 refers to another form of practice that may be relevant for the interpretation of a constituent instrument of an international organization: the practice of the organization *as such*, meaning its "own practice", as distinguished from the practice of the member States. The International Court of Justice has in some cases taken the practice of an international organization into account in its interpretation of constituent instruments without referring to the practice or acceptance of the member States of the organization. In particular, the Court has stated that the international organization's "own practice … may deserve special attention" in the process of interpretation.[558]

(27) For example, in its Advisory Opinion on the *Competence of the General Assembly regarding Admission to the United Nations*, the Court stated that:

> "The organs to which Article 4 entrusts the judgment of the Organization in matters of admission have consistently interpreted the text in the sense that the General Assembly can decide to admit only on the basis of the recommendation of the Security Council."[559]

(28) Similarly, in *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, the Court referred to acts of organs of the organization when it referred to the practice of "the United Nations":

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[554] S. Schiele, *Evolution of International Environmental Regimes: The Case of Climate Change* (Cambridge, Cambridge University Press, 2014), pp. 37–38; A. Gillespie, *Whaling Diplomacy: Defining Issues in International Environmental Law* (Cheltenham, Edward Elgar, 2005), p. 411.

[555] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226.

[556] *Ibid.*, p. 257, para. 83.

[557] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 149 (referring to General Assembly resolution 1600 (XV) of 15 April 1961 (adopted with 60 votes to 16, with 23 abstentions, including the Soviet Union and other States of Eastern Europe) and resolution 1913 (XVIII) of 13 December 1963 (adopted by 91 votes to 2 (Spain and Portugal)).

[558] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66, at p. 74; See also D. Simon, *L'interprétation judiciaire des traités d'organisations internationales* (Paris, Pedone, 1981), pp. 379–384.

[559] *Competence of Assembly regarding admission to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 4, at p. 9.

> "In practice, according to the information supplied by the Secretary-General, the United Nations has had occasion to entrust missions — increasingly varied in nature — to persons not having the status of United Nations officials. … In all these cases, the practice of the United Nations shows that the persons so appointed, and in particular the members of these committees and commissions, have been regarded as experts on missions within the meaning of Section 22."[560]

(29) In its *Inter-Governmental Maritime Consultative Organization* Advisory Opinion, the International Court of Justice referred to "the practice followed by the Organization itself in carrying out the Convention" as a means of interpretation.[561]

(30) In its advisory opinion on *Certain Expenses of the United Nations*, the Court explained why the practice of an international organization, as such, including that of a particular organ, may be relevant for the interpretation of its constituent instrument:

> "Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted; the opinion which the Court is in course of rendering is an advisory opinion. As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction. If the Security Council, for example, adopts a resolution purportedly for the maintenance of international peace and security and if, in accordance with a mandate or authorization in such resolution, the Secretary-General incurs financial obligations, these amounts must be presumed to constitute 'expenses of the Organization'."[562]

(31) Many international organizations share the same characteristic of not providing for an "ultimate authority to interpret" their constituent instrument. The conclusion that the Court has drawn from this circumstance is therefore now generally accepted as being applicable to international organizations.[563] The identification of a presumption, in the *Certain Expenses* advisory opinion, which arises from the practice of an international organization, including by one or more of its organs, is a way of recognizing such practice as a means of interpretation.[564]

(32) Whereas it is generally agreed that the interpretation of the constituent instruments of international organizations by the practice of their organs constitutes a relevant means of interpretation,[565] certain differences exist among writers about how to explain the relevance, for the purpose of interpretation, of an international organization's "own practice" in terms of the Vienna rules of interpretation.[566] The International Court of Justice, referring to acts

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[560] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, p. 177, at p. 194, para. 48.

[561] *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, I.C.J. Reports 1960*, p. 150, at p. 169.

[562] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 151, at p. 168.

[563] See J. Klabbers, *An Introduction to International Organizations Law*, 3rd edition (Cambridge, Cambridge University Press, 2015), p. 86; C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd edition (Cambridge, Cambridge University Press, 2005), p. 25; J.E. Alvarez, *International Organizations as Law-Makers* (Oxford, Oxford University Press, 2005), p. 80; Rosenne, *Developments in the Law of Treaties* ... (see footnote 509 above), pp. 224–225.

[564] See Lauterpacht, "The development of the law of international organization …" (footnote 388 above), p. 460; N.M. Blokker, "Beyond 'Dili': on the powers and practice of international organizations", in *State, Sovereignty, and International Governance*, G. Kreijen, ed. (Oxford, Oxford University Press, 2002), pp. 299–322, at pp. 312–318.

[565] C. Brölmann, "Specialized rules of treaty interpretation: international organizations", in Hollis, *The Oxford Guide to Treaties* (see footnote 407 above), pp. 507–534, at pp. 520–521; S. Kadelbach, "The interpretation of the Charter", in *The Charter of the United Nations: A Commentary*, 3rd edition, B. Simma and others, eds. (Oxford, Oxford University Press, 2012), p. 71, at p. 80; Gardiner, *Treaty Interpretation* (see footnote 5 above), pp. 127 and 281.

[566] Gardiner, *Treaty Interpretation* (see footnote 5 above), p. 282; Schermers and Blokker, *International Institutional Law* (see footnote 542 above), p. 844; J. Crawford, *Brownlie's Principles of Public International Law*, 8th edition (Oxford, Oxford University Press, 2012), p. 187; Klabbers, *An*

of international organizations that were adopted against the opposition of certain member states,[567] has recognized that such acts may constitute practice for the purposes of interpretation, but not a (more weighty) practice that establishes agreement between the parties regarding the interpretation and that would fall under article 31, paragraph 3. It is largely agreed, however, that the practice of an international organization, as such, will often also be relevant and thus may contribute to the interpretation of that instrument when applying articles 31 and 32.[568]

(33) The Commission has confirmed, in its commentary to draft conclusion 2, that given instances of subsequent practice and subsequent agreements contribute, or not, to the determination of the ordinary meaning of the terms in their context and in the light of the object and purpose of the treaty.[569] These considerations also apply, *mutatis mutandis*, to the practice of an international organization itself.

(34) The possible relevance of an international organization's "own practice" can thus be derived from articles 31 and 32 of the 1969 Vienna Convention. Those rules permit, in particular, taking into account practice of an organization itself, including by one or more of its organs, as being relevant for the determination of the function of the international organization concerned.[570] It is clear, however, that the practice of an international organization is not a subsequent practice of the parties themselves under article 31, paragraph 3 (b).

(35) Thus, article 5 of the 1969 Vienna Convention allows for the application of the rules of interpretation in articles 31 and 32 in a way that takes account of the practice of an international organization, in the interpretation of its constituent instrument, including taking into account its institutional character.[571] Such elements may thereby also contribute to identifying whether, and if so how, the meaning of a provision of a constituent instrument of an international organization is capable of evolving over time.[572]

Introduction to International Organizations Law (see footnote 563 above), pp. 85–86; see also *Partial Award on the Lawfulness of the Recall of the Privately Held Shares on 8 January 2001 and the Applicable Standards for Valuation of those Shares*, 22 November 2002, UNRIAA, vol. XXIII (Sales No. E/F.04.V.15), pp. 183–251, at p. 224, para. 145.

[567] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 149 (referring to General Assembly resolution 1600 (XV) of 15 April 1961 (adopted by 60 votes to 16, with 23 abstentions, including the Soviet Union and other States of Eastern Europe) and resolution 1913 (XVIII) of 13 December 1963 (adopted by 91 votes with 2 against (Spain and Portugal)).

[568] The International Court of Justice used the expression "… purposes and functions as specified or implied in its constituent documents and developed in practice", *Reparations for injuries suffered in the service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174, at p. 180.

[569] See para. (15) of the commentary to draft conclusion 1 and footnote 44 above; see also, in particular, *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, at pp. 306–307, para. 67.

[570] See *South-West Africa—Voting Procedure, Advisory Opinion of June 7th, 1955, I.C.J. Reports 1955*, p. 67, Separate Opinion of Judge Lauterpacht, at p. 106 ("… [a] proper interpretation of a constitutional instrument must take into account not only the formal letter of the original instrument, but also its operation in actual practice and in the light of the revealed tendencies in the life of the Organization").

[571] Commentators are debating whether the specific institutional character of certain international organizations, in combination with the principles and values that are enshrined in their constituent instruments could also yield a "constitutional" interpretation of such instruments that receives inspiration from national constitutional law, see, for example, J.E. Alvarez, "Constitutional interpretation in international organizations", in *The Legitimacy of International Organizations* J.-M. Coicaud and V. Heiskanen, eds. (Tokyo, United Nations University Press, 2001), pp. 104–154; A. Peters, "L'acte constitutif de l'organisation internationale", in E. Lagrange and J.-M. Sorel, eds., *Droit des organisations internationales* (Paris, LGDJ, 2013), pp. 216–218; M. Wood, "'Constitutionalization' of International Law: A Sceptical Voice", in *International Law and Power: Perspectives on Legal Order and Justice. Essays in Honour of Colin Warbrick*, K.H. Kaikobad and M. Bohlinder, eds. (Leiden/Boston, Brill/Nijhoff, 2009), pp. 85–97.

[572] *Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970), Advisory Opinion, I.C.J. Reports*

(36) Paragraph 3, like paragraph 2, refers to the practice of an international organization as a whole, rather than to the practice of an organ of an international organization. The practice of an international organization in question can arise from the conduct of an organ, but can also be generated by the conduct of two or more organs. It is understood that the practice of an international organization can only be relevant for the interpretation of its constituent instrument if that organization has acted within its competence, since it is a general requirement that international organizations do not act *ultra vires*.[573]

(37) Paragraph 3 of draft conclusion 12 builds on draft conclusion 5, which addresses "subsequent practice" by parties to a treaty in the application of that treaty, as defined in draft conclusion 4. Draft conclusion 5 does not imply that the practice of an international organization, as such, in the application of its constituent instrument cannot be relevant practice under articles 31 and 32.[574]

Paragraph 4 — without prejudice to the "rules of the organization"

(38) Paragraph 4 of draft conclusion 12 reflects article 5 of the Vienna Convention and its formulation borrows from that article. The paragraph applies to the situations covered under paragraphs 1 to 3 and ensures that the rules referred to therein are applicable, interpreted and applied "without prejudice to any relevant rules of the organization". The term "rules of the organization" is to be understood in the same way as in article 2, paragraph 1 (j), of the 1986 Vienna Convention, as well as in article 2 (b) of the articles on responsibility of international organizations of 2011.

(39) The Commission has stated in its general commentary to the 2011 draft articles on the responsibility of international organizations:

> "There are very significant differences among international organizations with regard to their powers and functions, size of membership, relations between the organization and its members, procedures for deliberation, structure and facilities, as well as the primary rules including treaty obligations by which they are bound."[575]

(40) Paragraph 4 implies, *inter alia*, that more specific "relevant rules" of interpretation that may be contained in a constituent instrument of an international organization may take precedence over the general rules of interpretation under the 1969 Vienna Convention.[576] If, for example, the constituent instrument contains a clause, such as article IX, paragraph 2, of the Marrakesh Agreement establishing the World Trade Organization, according to which the interpretation of the instrument is subject to a special procedure, it is to be presumed that the parties, by reaching an agreement after the conclusion of the treaty, do not wish to circumvent such a procedure by reaching a subsequent agreement under article 31, paragraph 3 (a). The special procedure under the treaty and a subsequent agreement under article 31, paragraph 3 (a), may, however, be compatible if they "serve different functions and have different legal effects".[577] Few constituent instruments contain explicit procedural

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1971, pp. 31–32, para. 53; see also draft conclusion 8 [3] and commentary thereto, paras. (24)–(30); Dörr, "Article 31 …" (see footnote 47 above), p. 575, para. 30; Schmalenbach, "Art. 5" (footnote 510 above), p. 92, para. 7.

[573] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 151, at p. 168 ("[b]ut when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization").

[574] See above commentary to draft conclusion 5, para. (14).

[575] Draft articles on the responsibility of international organizations, general commentary, para. (7) (report of the International Law Commission on its sixty-third session, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), chap. V, p. 70, para. 88).

[576] See, for example, Klabbers, *An Introduction to International Organizations Law* (footnote 563 above), p. 84; Schmalenbach, "Art. 5" (footnote 510 above), p. 89, para. 1, and p. 96, para. 15; Brölmann, "Specialized rules of treaty interpretation …" (footnote 565 above), p. 522; Dörr, "Article 31 …" (see footnote 47 above), pp. 576–577, para. 31.

[577] WTO Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, paras. 252–257.

or substantive rules regarding their interpretation.[578] Specific "relevant rules" of interpretation need not be formulated explicitly in the constituent instrument; they may also be implied therein, or derived from the "established practice of the organization".[579] The "established practice of the organisation" is a term that is narrower in scope than the term "practice of the organization".

(41) The Commission has noted in its commentary to article 2 (j) of the 1986 Vienna Convention that the significance of a particular practice of an organization may depend on the specific rules and characteristics of the respective organization, as expressed in its constituent instrument:

> "It is true that most international organizations have, after a number of years, a body of practice which forms an integral part of their rules. However, the reference in question is in no way intended to suggest that practice has the same standing in all organizations; on the contrary, each organization has its own characteristics in that respect."[580]

(42) In this sense, the "established practice of the organization" may also be a means for the interpretation of constituent instruments of international organizations. Article 2, paragraph 1 (j), of the 1986 Vienna Convention and article 2 (b) of the draft articles on the responsibility of international organizations[581] recognize the "established practice of the organization" as a "rule of the organization". Such practice may produce different legal effects in different organizations and it is not always clear whether those effects should be explained primarily in terms of traditional sources of international law (treaty or custom) or of institutional law.[582] As far as the constituent treaties of the European Union (European Union primary law) are concerned, for example, the Court of Justice of the European Union has never discussed or applied subsequent practice of the parties under article 31, paragraph 3, of the 1969 Vienna Convention, explaining on one occasion that even an agreement among all member States to defer implementation of a particular provision of the respective treaty was not sufficient to override its object and purpose.[583] But even if it is difficult to make general statements, the "established practice of the organization" usually

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[578] Most so-called interpretation clauses determine which organ is competent authoritatively to interpret the treaty, or certain of its provisions, but do not formulate specific rules "on" interpretation itself, see C. Fernández de Casadevante y Romani, *Sovereignty and Interpretation of International Norms* (Berlin/Heidelberg, Springer, 2007), pp. 26–27; Dörr, "Article 31 …" (see footnote 47 above), p. 576, para. 31.

[579] See 1986 Vienna Convention, art. 2 (j); and the International Law Commission's draft articles on the responsibility of international organizations, art. 2 (b), report of the International Law Commission on its sixty-third session, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), chap. V, sect. E, para. 87; C. Peters, "Subsequent practice and established practice of international organizations", *Göttingen Journal of International Law*, vol. 3 (2011), pp. 617–642.

[580] *Yearbook ... 1982*, vol. II (Part Two), chap. II, p. 21, commentary to draft article 2, para. 1 (j), para. (25).

[581] Report of the International Law Commission on its sixty-third session, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), chap. V, p. 52.

[582] See Higgins, "The Development of international law …" (footnote 536 above), p. 121 ("… aspects of treaty interpretation and customary practice in this field merge very closely"); Peters, "Subsequent practice …" (footnote 579 above), pp. 630–631 ("… should be considered a kind of customary international law of the organization"); it is not persuasive to limit the "established practice of the organization" to so-called internal rules since, according to the Commission, "there would have been problems in referring to the 'internal' law of an organization, for while it has an internal aspect, this law also has in other respects an international aspect", *Yearbook ... 1982*, vol. II (Part Two), chap. II, p. 21, commentary to draft article 2, para. 1 (j), para. (25); Schermers and Blokker, *International Institutional Law* (see footnote 542 above), p. 766; but see C. Ahlborn, "The rules of international organizations and the law of international responsibility", *International Organizations Law Review*, vol. 8 (2011), pp. 397–482, at pp. 424–428.

[583] Case C-43/75, *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena* [1976] *European Court Reports* 455, para. 57; see also G. Nolte, "Jurisprudence under special regimes relating to subsequent agreements and subsequent practice", in Nolte, *Treaties and Subsequent Practice* (see footnote 11 above), pp. 210–306, at pp. 297–300.

encompasses a specific form of practice,[584] one which has generally been accepted by the members of the organization, albeit sometimes tacitly.[585]

Conclusion 13
Pronouncements of expert treaty bodies

1. For the purposes of these draft conclusions, an expert treaty body is a body consisting of experts serving in their personal capacity, which is established under a treaty and is not an organ of an international organization.

2. The relevance of a pronouncement of an expert treaty body for the interpretation of a treaty is subject to the applicable rules of the treaty.

3. A pronouncement of an expert treaty body may give rise to, or refer to, a subsequent agreement or subsequent practice by parties under article 31, paragraph 3, or subsequent practice under article 32. Silence by a party shall not be presumed to constitute subsequent practice under article 31, paragraph 3 (b), accepting an interpretation of a treaty as expressed in a pronouncement of an expert treaty body.

4. This draft conclusion is without prejudice to the contribution that pronouncements of expert treaty bodies make to the interpretation of the treaties under their mandates.

Commentary

Paragraph 1 — definition of the term "expert treaty body"

(1) Some treaties establish bodies, consisting of experts who serve in their personal capacity, which have the task of monitoring or contributing in other ways to the application of those treaties. Examples of such expert treaty bodies are the committees established under various human rights treaties at the universal level,[586] for example, the Committee on the Elimination of Racial Discrimination, [587] the Human Rights Committee, [588] the Committee on the Elimination of All Forms of Discrimination against Women, [589] Committee on the Rights of Persons with Disabilities,[590] the Committee on the Rights of the Child[591] and the Committee against Torture.[592] Other expert treaty bodies include the Commission on the Limits of the Continental Shelf under the United Nations Convention

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[584] Blokker, "Beyond 'Dili' …" (see footnote 564 above), p. 312.

[585] Lauterpacht, "The development of the law of international organization …" (footnote 388 above), p. 464 ("… consent of the general body of membership"); Higgins, "The Development of international law …" (footnote 536 above), p. 121 ("[t]he degree of length and acquiescence need here perhaps to be less marked than elsewhere, because the U.N. organs undoubtedly have initial authority to make such decisions [regarding their own jurisdiction and competence]"); Peters, "Subsequent practice and established practice …" (footnote 579 above), pp. 633–641.

[586] See Nigel Rodley, "The role and impact of treaty bodies", in *The Oxford Handbook of International Human Rights Law*, D. Shelton, ed. (Oxford, Oxford University Press, 2013), pp. 621–641, at pp. 622–623.

[587] Arts. 8–14 of the International Convention on the Elimination of All Forms of Racial Discrimination (New York, 7 March 1966), United Nations, *Treaty Series*, vol. 660, No. 9464, p. 195.

[588] Arts. 28–45 of the International Covenant on Civil and Political Rights (New York, 19 December 1966), *ibid.*, vol. 999, No. 14668, p. 171.

[589] Arts. 17–22 of the Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979), *ibid.*, vol. 1249, No. 20378, p. 13.

[590] Arts. 34–39 of the Convention on the Rights of Persons with Disabilities (New York, 13 December 2006), *ibid.*, vol. 2515, No. 44910, p. 3.

[591] Arts. 43–45 of the Convention on the Rights of the Child (New York, 20 November 1989), *ibid.*, vol. 1577, No. 27531, p. 3.

[592] Arts. 17–24 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984), *ibid.*, vol. 1465, No. 24841, p. 85.

on the Law of the Sea,[593] the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention),[594] and the International Narcotics Control Board under the Single Convention on Narcotic Drugs.[595]

(2) Paragraph 1 defines the term "expert treaty body" only "for the purposes of these draft conclusions".

(3) The term "serving in their personal capacity" means that the members of an expert treaty body are free from governmental instructions when they act in that capacity.[596] Draft conclusion 13 is not concerned with bodies that consist of State representatives. The output of a body that is composed of State representatives, and that is not an organ of an international organization, is a form of practice by those States that thereby act collectively within its framework.[597]

(4) Draft conclusion 13 also does not apply to bodies that are organs of an international organization.[598] The output of a body that is an organ of an international organization is, in the first place, attributed to the organization.[599] The exclusion of bodies that are organs of international organizations from the scope of draft conclusion 13 has been made for reasons of consistency, since the present draft conclusions are not focused on the relevance of the practice of international organizations for the application of the rules of interpretation of the Vienna Convention except as far as the interpretation of their constituent instruments is concerned (see draft conclusion 12, in particular paragraph 3). This does not exclude that the substance of the present draft conclusion may apply, *mutatis mutandis*, to pronouncements of independent expert bodies that are organs of international organizations.

(5) The expression "established under a treaty" means that the establishment or a competence of a particular expert body is provided under a treaty. In most cases it is clear whether these conditions are satisfied, but there may also be borderline cases. The Committee on Economic, Social and Cultural Rights, for example, is a body that was established by a resolution of an international organization,[600] but which was later given the

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[593] The Commission on the Limits of the Continental Shelf was established under art. 76, para. 8, of the United Nations Convention on the Law of the Sea and annex II to the Convention (Montego Bay, 10 December 1982), United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3.

[594] The Compliance Committee under the Aarhus Convention was established under art. 15 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, Denmark, 25 June 1998), *ibid.*, vol. 2161, No. 37770, p. 447, and decision I/7 on review of compliance, adopted at the first meeting of the parties in 2002 (ECE/MP.PP/2/Add.8).

[595] The International Narcotics Control Board was established under art. 5 of the Single Convention on Narcotic Drugs (New York, 30 March 1961), United Nations, *Treaty Series*, vol. 520, No. 7515, p. 151.

[596] See, e.g., art. 28, para. 3, of the International Covenant on Civil and Political Rights; see also Christian Tomuschat, *Human Rights: Between Idealism and Realism*, 3rd edition (Oxford, Oxford University Press, 2014), p. 219.

[597] This is true, in particular, for decisions of Conferences of States Parties, see draft conclusion 12 [11].

[598] The Committee of Experts on the Application of Conventions and Recommendations of the International Labour Organization (ILO) is an important example of an expert body that is an organ of an international organization. It was established in 1926 to examine government reports on ratified conventions. It is composed of 20 eminent jurists from different geographic regions, legal systems and cultures, who are appointed by the governing body of ILO for three-year terms, see www.ilo.org and information provided by ILO to the Commission, which is available on the International Law Commission website at http://legal.un.org/ilc/guide/1_11.shtml.

[599] Art. 6, para. 1, of the articles on responsibility of international organizations, General Assembly resolution 66/100, annex, of 9 December 2011 (for the commentary thereto, see *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), chap. V, sect. E); the Working Group on Arbitrary Detention is an example of a body of experts serving in their personal capacity that is mandated by the Human Rights Council under its resolution 24/7 of 26 September 2013, *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 53* (A/68/53/Add.1). Being a subsidiary organ of the Council, it is not an expert treaty body in the sense of draft conclusion 13, see www.ohchr.org/EN/Issues/Detention/Pages/WGADIndex.aspx.

[600] Economic and Social Council, resolution 1987/5 of 26 May 1987 (E/C.12/1989/4), para. 9.

competence to "consider" certain "communications" by the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.[601] Such a body is an expert treaty body within the meaning of draft conclusion 13 as a treaty provides for the exercise of certain competences by the Committee. Another borderline case is the Compliance Committee under the Kyoto Protocol to the United Nations Framework Convention on Climate Change, the establishment of which — by a decision of the Conference of the Parties — is implicitly [illegible] in article 18 of the Protocol.[602]

Paragraph 2 — primacy of the rules of the [illegible]

(6) Treaties use various terms for designating the forms of action of expert treaty bodies, for example, "views",[603] "recommendations",[604] "comments",[605] "measures"[606] and "consequences".[607] Draft conclusion 13 employs, for the purpose of the present draft conclusion, the general term "pronouncements".[608] This term covers all relevant factual and normative assessments by expert treaty bodies. Other general terms that are in use for certain bodies include "jurisprudence"[609] and "output".[610] Such terms are either too narrow,

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[601] Arts. 1–15 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, annexed to General Assembly resolution 63/117 of 10 December 2008.

[602] The Compliance Committee under the Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto, 11 December 1997) (United Nations, *Treaty Series*, vol. 2303, No. 30822, p. 162) was established under art. 18 of the Protocol and decision 24/CP.7 on procedures and mechanisms relating to compliance under the Kyoto Protocol, adopted by the Conference of the Parties at its seventh session (FCCC/CP/2001/13/Add.3).

[603] See International Covenant on Civil and Political Rights, art. 42, para. 7 (c); Optional Protocol to the International Covenant on Civil and Political Rights, art. 5, para. 4; and Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, art. 9, para. 1.

[604] See International Convention on the Elimination of All Forms of Racial Discrimination, art. 9, para. 2; Convention on the Elimination of All Forms of Discrimination against Women, art. 21, para. 1; Convention on the Rights of the Child (New York, 29 November 1989) (United Nations, *Treaty Series*, vol. 1577, No. 27531, p. 3), art. 45 (d); International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006) (*ibid.*, vol. 2716, No. 48088, p. 3), art. 33, para. 5; United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982) (*ibid.*, vol. 1833, No. 31363, p. 3), art. 76, para. 8.

[605] See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 19, para. 3; International Covenant on Civil and Political Rights, art. 40, para. 4; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (New York, 18 December 1990) (United Nations, *Treaty Series*, vol. 2220, No. 39481, p. 3), art. 74.

[606] Decision I/7 on review of compliance (see footnote 594 above), sect. XI, para. 36, and sect. XII, para. 37; Single Convention on Narcotic Drugs, art. 14.

[607] Decision 24/CP.7 on procedures and mechanisms relating to compliance under the Kyoto Protocol (see footnote 602 above), annex, sect. XV.

[608] See *Official Records of the General Assembly, Seventieth Session, Supplement No. 10* (A/70/10), chap. III, para. 26 (b); see also the "Final report on the impact of findings of the United Nations human rights treaty bodies", International Law Association, *Report of the Seventy-first Conference* (see footnote 150 above) p. 5, para. 15; European Commission for Democracy through Law (Venice Commission), "Report on the implementation of international human rights treaties in domestic law and the role of courts" (CDL-AD(2014)036), adopted by the Venice Commission at its 100th plenary session (Rome, 10–11 October 2014), p. 31, para. 78.

[609] See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, at pp. 663–664, para. 66; Rodley, "The role and impact of treaty bodies" (footnote 586 above), p. 640; *Case Law of the Aarhus Convention Compliance Committee (2004–2014)*, 3rd ed. (2016), A. Andrusevych and S. Kern, eds. (Lviv, Resource and Analysis Center "Society and Environment", 2011); "Compilation of findings of the Aarhus Convention Compliance Committee adopted 18 February 2005 to date", available from www.unece.org/fileadmin/DAM/env/pp/compliance/Compilation_of_CC_findings.pdf (accessed 8 July 2016).

[610] R. Van Alebeek and A. Nollkaemper, "The legal status of decisions by human rights treaty bodies in national law", in *UN Human Rights Treaty Bodies: Law and Legitimacy*, H. Keller and L. Grover, eds. (Cambridge, United Kingdom, Cambridge University Press, 2012), pp. 356–413, at p. 402; Rodley, "The role and impact of treaty bodies" (see footnote 586 above), p. 639; K. Mechlem,

suggesting a particular legal significance of the output of such a body, or too broad, covering any act of an expert treaty body, to be appropriate for the purpose of this draft conclusion, which applies to a broad range of expert treaty bodies.

(7) Paragraph 2 serves to emphasize that any possible legal effect of a pronouncement by an expert treaty body depends, first and foremost, on the specific rules of the applicable treaty. Such possible legal effects may therefore be very different. They must be determined by way of applying the rules on treaty interpretation set forth in the Vienna Convention. The ordinary meaning of the term by which a treaty designates a particular form of pronouncement, or its context, usually gives a clear indication that such pronouncements are not legally binding.[611] This is true, for example, for the terms "views" (article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights), "suggestions and recommendations" (article 14, paragraph 8, of the International Convention on the Elimination of All Forms of Racial Discrimination) and "recommendations" (article 76, paragraph 8, of the United Nations Convention on the Law of the Sea). The words "the treaty" may refer to the treaty establishing the expert treaty body, as well as to the treaty being interpreted. These can be two different instruments, and expert treaty bodies may thus sometimes be authorized to interpret treaties other than those under which they are established.[612]

(8) It is not necessary, for present purposes, to describe the competences of different expert treaty bodies in detail. Pronouncements of expert treaty bodies under human rights treaties, for example, are usually either adopted in reaction to State reports (for example, "concluding observations"), or in response to individual communications (for example, "views"), or regarding the implementation or interpretation of the respective treaties generally (for example, "general comments").[613] Whereas such pronouncements are governed by different specific provisions of the treaty that primarily determine their legal effect, they often, explicitly or implicitly, interpret the treaty in a way that raises some general issues that draft conclusion 13 seeks to address.[614]

"Treaty bodies and the interpretation of human rights", *Vanderbilt Journal of Transnational Law*, vol. 42 (2009), pp. 905–947, at p. 908.

[611] This is generally accepted in the literature, see International Law Association, *Report of the Seventy-first Conference* (see footnote 150 above), p. 5, para. 18; Rodley, "The role and impact of treaty bodies" (see footnote 586 above), p. 639; Tomuschat, *Human Rights* ... (see footnote 596 above), pp. 233 and 267; D. Shelton, "The legal status of normative pronouncements of human rights treaty bodies" in *Coexistence, Cooperation and Solidarity, Liber Amicorum Rüdiger Wolfrum*, vol. I, H.P. Hestermeyer and others, eds. (Leiden; Boston, Martinus Nijhoff Publishers, 2012), pp. 553–575, at p. 559; H. Keller and L. Grover, "General comments of the Human Rights Committee and their legitimacy", in Keller and Grover, *UN Human Rights Treaty Bodies* ... (see footnote 610 above), pp. 116–198, at p. 129; Venice Commission, "Report on the implementation of international human rights treaties … (see footnote 608 above), p. 30, para. 76; for the term "determine" in art. 18 of the Kyoto Protocol and decision 24/CP.7, see G. Ulfstein and J. Werksmann, "The Kyoto compliance system: towards hard enforcement", in *Implementing the Climate Regime: International Compliance*, O.S. Stokke, J. Hovi and G. Ulfstein, eds. (London, Fridtjof Nansen Institut, 2005), pp. 39–62, at pp. 55–56.

[612] See, for example, arts. 1 and 2 of the Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights (New York, 10 December 2008), General Assembly resolution 63/117, annex.

[613] W. Kälin, "Examination of state reports", in Keller and Grover, *UN Human Rights Treaty Bodies* ... (see footnote 610 above), pp. 16–72; G. Ulfstein, "Individual complaints", *ibid.*, pp. 73–115; Mechlem, "Treaty bodies …" (see footnote 610 above), pp. 922–930; the legal basis for general comments under the International Covenant on Civil and Political Rights is art. 40, para. 4, but this practice has been generally accepted also with regard to other expert bodies under human rights treaties, see Keller and Grover, "General comments …" (see footnote 611 above), pp. 127–128.

[614] For example, Rodley, "The role and impact of treaty bodies" (see footnote 586 above), p. 639; Shelton, "The legal status of normative pronouncements …" (see footnote 611 above), pp. 574–575; A. Boyle and C. Chinkin, *The Making of International Law* (Oxford, Oxford University Press, 2007), p. 155.

Paragraph 3, first sentence — "may give rise to, or refer to, a subsequent agreement or a subsequent practice"

(9) A pronouncement of an expert treaty body cannot as such constitute subsequent practice under article 31, paragraph 3 (b), since this provision requires a subsequent practice of the parties that establishes their agreement regarding the interpretation of the treaty. This has been confirmed, for example, by the reaction to a draft proposition of the Human Rights Committee according to which its own "general body of jurisprudence", or the acquiescence by States to that jurisprudence, would constitute subsequent practice under article 31, paragraph 3 (b). The proposition of the Human Rights Committee was:

> "In relation to the general body of jurisprudence generated by the Committee, it may be considered that it constitutes 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' within the sense of article 31(3)(b) of the Vienna Convention on the Law of Treaties, or, alternatively, the acquiescence of States parties in those determinations constitutes such practice."[615]

(10) When this proposition was criticized by some States,[616] the Committee did not pursue its proposal and adopted its general comment No. 33 without a reference to article 31, paragraph 3 (b).[617] This confirms that pronouncements of expert treaty bodies cannot as such constitute subsequent practice under article 31, paragraph 3 (b).[618]

(11) Pronouncements of expert treaty bodies may, however, give rise to, or refer to, a subsequent agreement or a subsequent practice by the parties which establish their agreement regarding the interpretation of the treaty under article 31, paragraph 3 (a) or (b). This possibility has been recognized by States,[619] by the Commission[620] and also by the International Law Association[621] and by a significant number of authors.[622] There is indeed no reason why a subsequent agreement between the parties or subsequent practice that establishes the agreement of the parties themselves regarding the interpretation of a treaty could not arise from, or be referred to by, a pronouncement of an expert treaty body.

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[615] Draft general comment No. 33 (The obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights) (Second revised version as of 18 August 2008) (CCPR/C/GC/33/CRP.3), 25 August 2008, at para. 17; this position has also been put forward by several authors, see Keller and Grover, "General comments …" (see footnote 611 above), pp. 130–132 with further references.

[616] See, for example, the "Comments of the United States of America on the Human Rights Committee's 'Draft general comment 33: The Obligations of States Parties under the Optional Protocol to the International Covenant Civil and Political Rights'", 17 October 2008, para. 17. Available from www.state.gov/documents/organization/138851.pdf (accessed 8 July 2016).

[617] Report of the Human Rights Committee, *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 40* (A/64/40), vol. I, annex V.

[618] Dörr, "Article 31 …" (see footnote 47 above), p. 600, para. 85.

[619] See, for example, *Official Records of the General Assembly, Seventieth Session, Sixth Committee*, Summary Record of the 22nd meeting (A/C.6/70/SR.22), 6 November 2015, para. 46 (United States: "… States Parties' reactions to the pronouncements or activities of a treaty body might, in some circumstances, constitute subsequent practice (of those States) for the purposes of art. 31, paragraph 3").

[620] See para. (11) of the commentary to draft conclusion 3.

[621] See International Law Association, *Report of the Seventy-first Conference* (see footnote 150 above), p. 6, para. 21.

[622] See, for example, M. Kanetake, "UN human rights treaty monitoring bodies before domestic courts", *International and Comparative Law Quarterly*, vol. 67 (2018), pp. 201–232, at p. 218; Mechlem, "Treaty bodies …" (see footnote 610 above), pp. 920–921; B. Schlütter, "Aspects of human rights interpretation by the UN treaty bodies", in Keller and Grover, *UN Human Rights Treaty Bodies* … (see footnote 610 above), pp. 289–290; E. Klein and D. Kretzmer, "The UN Human Rights Committee: the general comments – the evolution of an autonomous monitoring instrument", *German Yearbook of International Law*, vol. 58 (2015), pp. 189–229, at pp. 205–206; Ulfstein and Werksmann, "The Kyoto compliance system …" (see footnote 611 above), p. 96.

(12) Whereas a pronouncement of an expert treaty body can, in principle, give rise to a subsequent agreement or a subsequent practice by the parties themselves under article 31, paragraph 3 (a) and (b), this result is not easily achieved in practice. Most treaties that establish expert treaty bodies at the universal level have many parties. It will often be difficult to establish that all parties have accepted, explicitly or implicitly, that a particular pronouncement of an expert treaty body expresses a particular interpretation of the treaty.

(13) One possible way of identifying an agreement of the parties regarding the interpretation of a treaty that is reflected in a pronouncement of an expert treaty body is to look at resolutions of organs of international organizations as well as of Conferences of States Parties. General Assembly resolutions may, in particular, explicitly or implicitly refer to pronouncements of expert treaty bodies. This is true, for example, for two resolutions of the General Assembly on the "protection of human rights and fundamental freedoms while countering terrorism",[623] which expressly refer to general comment No. 29 (2001) of the Human Rights Committee on derogations from provisions of the Covenant during a state of emergency.[624] Both resolutions reaffirm the obligation of States to respect certain rights under the International Covenant on Civil and Political Rights as non-derogable in any circumstances and underline the "exceptional and temporary nature" of derogations by way of using the terms used in general comment No. 29 when interpreting and thereby specifying the obligation of States under article 4 of the Covenant.[625] These resolutions were adopted without a vote by the General Assembly, and hence would reflect a subsequent agreement under article 31, paragraph 3 (a) or (b), if the consensus constituted the acceptance by all the parties of the interpretation that is contained in the pronouncement.[626]

(14) The pronouncement of the Committee on Economic, Social and Cultural Rights, in its general comment No. 15 (2002), according to which articles 11 and 12 of that Covenant imply a human right to water,[627] offers another illustration of the way in which an agreement of the parties may come about. After a debate over a number of years, the General Assembly on 17 December 2015 adopted a resolution, without a vote, that defines the human right to safe drinking water by using the language that the Committee employed in its general comment No. 15 in order to interpret the right.[628] That resolution may refer to an agreement under article 31, paragraph 3 (a) or (b), depending on whether the consensus constituted the acceptance by all parties of the interpretation that is contained in the pronouncement.[629]

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[623] General Assembly resolutions 65/221 of 21 December 2010, para. 5, footnote 8, and 68/178 of 18 December 2013, para. 5, footnote 8.

[624] Report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40* (A/56/40), vol. I, Annex VI.

[625] *Ibid.*, para. 2.

[626] See draft conclusion 11, para. 3, and the commentary thereto.

[627] Committee on Economic, Social and Cultural Rights, general comment No. 15 (2002), *Official Records of the Economic and Social Council 2003, Supplement No. 2* (E/2003/22-E/C.12/2002/13), annex IV, para. 2. ("The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses").

[628] General Assembly resolution 70/169 of 17 December 2015 recalls general comment No. 15 of the Committee on Economic, Social and Cultural Rights on the right to water (see footnote 627 above) and uses the same language: "Recognizes that the human right to safe drinking water entitles everyone, without discrimination, to have access to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use" (para. 2).

[629] See draft conclusion 11, para. 3, and the commentary thereto, paras. (31)–(38); in the case of resolution 70/169 on the right to water (see footnote 628 above) "… the United States dissociated itself from the consensus on paragraph 2 on the grounds that the language used to define the right to water and sanitation was based on the views of the Committee on Economic, Social and Cultural Rights and the Special Rapporteur only and did not appear in any international agreement or reflect any international consensus" (see *Official Records of the General Assembly, Seventieth Session, Third Committee, 55th meeting* (A/C.3/70/SR.55), 24 November 2015, para. 144). It is not entirely clear whether the United States thereby wished to merely restate its position that the resolution did not recognize a particular effect of the pronouncement of the Committee, as such, or whether it disagreed with the definition in substance.

(15) Other General Assembly resolutions explicitly refer to pronouncements of expert treaty bodies[630] or call upon States to take into account the recommendations, observations and general comments of relevant treaty bodies to the topic on the implementation of the related treaties.[631] Resolutions of Conferences of States Parties may do the same, as with regard to recommendations of the Compliance Committee under the Aarhus Convention.[632] Such resolutions should, however, be approached with caution before reaching any conclusion as to whether they imply a subsequent agreement or subsequent practice of the parties under article 31, paragraph 3 (a) or (b).

(16) Even if a pronouncement of an expert treaty body does not give rise to, or refer to, a subsequent agreement or a subsequent practice that establishes the agreement of all parties to a treaty, it may be relevant for the identification of other subsequent practice under article 32 that does not establish such agreement. There are, for example, resolutions of the Human Rights Council that refer to general comments of the Human Rights Committee or of the Committee on Economic, Social, and Cultural Rights.[633] Even if the membership of the Council is limited, such resolutions may be relevant for the interpretation of a treaty as expressing other subsequent practice under article 32. Another example concerns the International Narcotics Control Board.[634] A number of States have engaged in subsequent practice under article 32 by disagreeing with the proposals of the Board regarding the establishment of so-called safe injection rooms and other harm reduction measures,[635] criticizing the Board for following too rigid an interpretation of the drug conventions and as acting beyond its mandate.[636]

(17) Paragraph 3, first sentence, circumscribes the ways in which a pronouncement by an expert treaty body may be relevant for subsequent agreements and subsequent practice of parties to a treaty by using the terms "may give rise to" and "or refer to". The expression "may give rise to" addresses situations in which a pronouncement comes first and the practice and the possible agreement of the parties occur thereafter. In this situation, the pronouncement may serve as a catalyst for the subsequent practice of States parties.[637] The term "refer to", on the other hand, covers situations in which the subsequent practice and a

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[630] See General Assembly resolution 69/166 of 18 December 2014, adopted without a vote, recalling general comment No. 16 of the Human Rights Committee on the right to respect of privacy, family, home and correspondence, and protection of honour and reputation (*Official Records of the General Assembly, Forty-third Session, Supplement No. 40* (A/43/40), annex VI).

[631] See General Assembly resolution 69/157 of 18 December 2014, adopted without a vote; and resolution 68/147 of 18 December 2013, adopted without a vote.

[632] Decision I/7 on review of compliance (see footnote 594 above), annex, sects. III and XII, para. 37; V. Koester, "The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)", in *Making Treaties Work, Human Rights, Environment and Arms Control*, G. Ulfstein and others, eds. (Cambridge, United Kingdom, Cambridge University Press, 2007), pp. 179–217, at p. 203.

[633] See Human Rights Council resolutions 28/16 of 26 March 2015 and 28/19 of 27 March 2015, adopted without a vote (report of the Human Rights Council, *Official Records of the General Assembly, Seventieth Session, Supplement No. 53* (A/70/53)).

[634] See footnote 595 above.

[635] See *Report of the International Narcotics Control Board for 2009* (E/INCB/2009/1, United Nations Publication, Sales No. E.10.XI.1), para. 278; see also P. Gallahue, "International drug control", in *The Practice of Shared Responsibility in International Law*, A. Nollkaemper and I. Plakokefalos, eds. (Cambridge, Cambridge University Press, 2017), p. 171, footnote 55.

[636] D. Barrett, *Unique in International Relations? A Comparison of the International Narcotics Control Board and the UN Human Rights Treaty Bodies* (London, International Harm Reduction Association, 2008), p. 8; D.R. Bewley-Taylor, *International Drug Control: Consensus Fractured* (Cambridge University Press, Cambridge, 2012), pp. 124–126.

[637] See e.g. Committee on the Elimination of Discrimination against Women, general recommendation No. 35 (2017) on gender-based violence against women, updating general recommendation No. 19 (CEDAW/C/GC/35): "For over 25 years, the practice of States parties has endorsed the Committee's interpretation. The *opinio juris* and State practice suggest that the prohibition of gender-based violence against women has evolved into a principle of customary international law", quoting State practice and *opinion juris* as well as judicial decisions in support of the statement "that general recommendation No. 19 has been a key catalyst for this process" (*ibid.*, para. 2).

possible agreement of the parties have developed before the pronouncement, and where the pronouncement is only an indication of such an agreement or practice. Paragraph 3 uses the term "refer to" rather than "reflect" in order to make clear that any subsequent practice or agreement of the parties is not comprised in the pronouncement itself. This term does not, however, require that the pronouncement refer to such subsequent practice or agreement explicitly.[638]

Paragraph 3, second sentence — presumption against silence as constituting acceptance

(18) An agreement of all the parties to a treaty, or even only a large part of them, regarding the interpretation that is articulated in a pronouncement is often only conceivable if the absence of objections could be taken as agreement by State parties that have remained silent. Draft conclusion 10 , paragraph 2, provides, as a general rule: "Silence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction."[639] Paragraph 3, second sentence, does not purport to recognize an exception to this general rule, but rather intends to specify and apply this rule to the typical cases of pronouncements of expert bodies.

(19) This means, in particular, that it cannot usually be expected that States parties take a position with respect to every pronouncement by an expert treaty body, be it addressed to another State or to all States generally.[640] On the other hand, State parties may have an obligation, under a duty to cooperate under certain treaties, to take into account and to react to a pronouncement of an expert treaty body that is specifically addressed to them,[641] or to individual communications regarding their own conduct.[642]

Paragraph 4 — without prejudice to other contribution

(20) Draft conclusion 13 only addresses the possible contribution of expert treaty bodies to the interpretation of a treaty by giving rise to, or referring to, subsequent agreements or subsequent practice of the parties themselves under articles 31, paragraph 3 (a) and (b), and 32. Paragraph 4 confirms, by way of a no prejudice clause, that pronouncements by expert treaty bodies also otherwise contribute to, and thus are relevant for, the interpretation of a treaty.

(21) The International Court of Justice has confirmed, in particular in the *Ahmadou Sadio Diallo* case, that pronouncements of the Human Rights Committee are relevant for the purpose of the interpreting of the International Covenant on Civil and Political Rights, irrespective of whether such pronouncements give rise to, or refer to, an agreement of the parties under article 31, paragraph 3:

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[638] Expert treaty bodies under human rights treaties have rarely attempted to specifically identify the practice of the parties for the purpose of interpreting a particular treaty provision, see examples in G. Nolte, "Jurisprudence under special regimes relating to subsequent agreements and subsequent practice: second report for the ILC Study Group on treaties over time", in *Treaties and Subsequent Practice*, G. Nolte, ed. (Oxford, Oxford University Press, 2013), pp. 210–278; Schlütter, "Aspects of human rights interpretation …" (see footnote 622 above), p. 318.

[639] See draft conclusion 10, para. 2.

[640] See Ulfstein and Werksmann, "The Kyoto compliance system …" (see footnote 611 above), p. 97; Van Alebeek and Nollkaemper, "The legal status of decisions by human rights treaty bodies …" (see footnote 610 above), p. 410.

[641] Such as a pronouncement regarding the permissibility of a reservation that it has formulated, see guideline 3.2.3 of the guide to practice on reservations to treaties, and para. (3) of the commentary thereto, adopted by the Commission in 2011, report of the International Law Commission, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10/Add.1).

[642] C. Tomuschat, "Human Rights Committee", in *The Max Planck Encyclopedia of Public International Law* (www.mpepil.com), at para. 14 ("States parties cannot simply ignore them [individual communications] but have to consider them in good faith (*bona fide*) … not to react at all … would appear to amount to a violation …"), in this sense also European Commission for Democracy through Law (Venice Commission), Study No. 690/2012 and Report on the implementation of international human rights treaties in domestic law and the role of courts, adopted by the Venice Commission at its 100th plenary session (Rome, 10–11 October 2014), para. 78–79.

> "Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of States parties to the first Optional Protocol, and in the form of 'General Comments'.
>
> "Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled."[643]

(22) Regional human rights courts have also used pronouncements of expert treaty bodies as an aid for the interpretation of treaties that they are called on to apply.[644] Many domestic courts consider that pronouncements of expert treaty bodies under human rights treaties, while not being legally binding on them as such,[645] nevertheless "deserve to be given considerable weight in determining the meaning of a relevant right and the determination of a violation".[646]

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[643] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, at pp. 663–664, para. 66; see also *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, I.C.J. Reports 2012*, p. 10, at p. 27, para. 39; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at pp. 179–181, paras. 109–110 and 112, and at pp. 192–193, para. 136, in which the Court referred to various pronouncements of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights; see also *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 422, at p. 457, para. 101, referring to pronouncements of the Committee against Torture when determining the temporal scope of the Convention against Torture.

[644] The Inter-American Court of Human Rights, *Case of the Constitutional Tribunal (Camba Campos and Others) v. Ecuador*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 28 August 2013, Series C No. 268, paras. 189 and 191; African Commission on Human and Peoples' Rights, *Civil Liberties Organisation and others v. Nigeria*, Communication No. 218/98, Decisions on communications brought before the African Commission, twenty-ninth ordinary session, Tripoli, May 2001 at para. 24 ("In interpreting and applying the Charter, the Commission … is also enjoined by the Charter and by international human rights standards, which include decisions and general comments by UN treaty bodies"); African Commission on Human and Peoples' Rights, *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*, Communication No. 155/96, Decisions on communications brought before the African Commission, thirtieth ordinary session, Banjul, October 2001 at para. 63 ("draws inspiration from the definition of the term 'forced evictions' by the Committee on Economic Social and Cultural Rights in its General Comment No. 7"); European Court of Human Rights: *Magyar Helsinki Bizottsag v. Hungary* [GC] (see footnote 337 above), para. 141; *Marguš v. Croatia* [GC], No. 4455/10, ECHR 2014 (extracts), paras. 48–50; *Baka v. Hungary*, No. 20261/12, 27 May 2014, para. 58; *Othman (Abu Qatada) v. the United Kingdom*, No. 8139/09, ECHR 2012 (extracts), paras. 107–108, 147–151, 155 and 158; *Gäfgen v. Germany* [GC], No. 22978/05, ECHR 2010, paras. 68 and 70–72; see also International Law Association, *Report of the Seventy-first Conference* (footnote 150 above), pp. 29–38, paras. 116–155.

[645] See the decisions quoted in Venice Commission, "Report on the implementation of international human rights treaties …" (footnote 608 above), at para. 76, footnotes 172 and 173 (Ireland, Supreme Court, *Kavanagh (Joseph) v. the Governor of Mountjoy Prison and the Attorney General* [2002] IESC 13 (1 March 2002), para. 36; France, Council of State, *Hauchemaille v. France*, case No. 238849, 11 October 2001, ILDC 767 (FR 2001), para. 22).

[646] International Law Association, *Report of the Seventy-first Conference* (footnote 150 above), p. 43, para. 175; see e.g. Germany, Federal Administrative Court, BVerwGE, vol. 134, p. 1, at p. 22, para. 48; Colombia, Constitutional Court, Sentencia T-077/13 (2013), 14 February 2013; India, High Court of Delhi, *Laxmi Mandal v. Deen Dayal Harinagar Hospital & Ors*, WP(C) Nos 8853 of

(23) The Commission itself, in its commentary to the Guide to Practice on Reservations to Treaties,[647] addressed the question of the relevance of pronouncements of expert treaty bodies under human rights treaties with respect to reservations.[648]

(24) Court decisions have not always fully explained the relevance of pronouncements by expert treaty bodies for the purpose of the interpretation of a treaty. In the Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice referred to the "constant practice of the Human Rights Committee" in order to support its own interpretation of a provision of the International Covenant on Civil and Political Rights.[649] This suggests that pronouncements of expert treaty bodies are to be used in the discretionary way in which article 32 describes supplementary means of interpretation[650] and that they also "contribute to the determination of the ordinary meaning of the terms in their context and in light of the object and purpose of the treaty".[651] Whereas pronouncements of expert treaty bodies are not practice of a party to the treaty, they are nevertheless conduct mandated by the treaty the purpose of which is to contribute to the treaty's proper application. Assuming that "different activities of [treaty] bodies cut across the different sources", reference has also been made to Article 38,

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2008, and 10700 of 2009 (2010), Judgment of 4 June 2010, para 23; Bangladesh, High Court Division of the Supreme Court, *Bangladesh Legal Aid and Services Trust and ors v. Government of Bangladesh*, Writ Petitions No 5863 of 2009, No 754 of 2010, No 4275 of 2010, ILDC 1916 (BD 2010), 8 July 2010, para. 45.

[647] Report of the International Law Commission (2011), *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10/Add.1).

[648] "Of course, if such bodies have been vested with decision-making power the parties must respect their decisions, but this is currently not the case in practice except for some regional human rights courts. In contrast, the other monitoring bodies lack any juridical decision-making power, either in the area of reservations or in other areas in which they possess declaratory powers. Consequently, their conclusions are not legally binding, and States parties are obliged only to 'take account' of their assessments in good faith" (*ibid.*, para. (3) of the commentary to guideline 3.2.3).

[649] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 179, para. 109.

[650] The High Court of Osaka has explicitly stated: "One may consider that the 'general comments' and 'views'… should be relied upon as supplementary means of interpretation of the ICCPR." Osaka High Court, Judgment of 28 October 1994, as quoted in the *Report of the Seventy-first Conference* of the International Law Association (see footnote 150 above), at para. 85, footnote 178, also available in *Japanese Annual of International Law*, vol. 38 (1995), at pp. 129–130; see also, for example, Netherlands, Central Appeals Tribunal, *Appellante v. de Raad van Bestuur van de Sociale Verzekeringsbank* (available from http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:CRVB:2006:AY5560, accessed 11 July 2016); United Kingdom, on the one hand, House of Lords, *Jones v. Saudi Arabia*, 14 June 2006 [2006] UKHL 26 ("no value") and, on the other hand, House of Lords, *A. v. Secretary of State for the Home Department* [2005] UKHL 71, paras. 34–36 (relying on treaty body pronouncements to establish an exclusionary rule of evidence that prevents the use of information obtained by means of torture) and Court of Appeal, *R. (on the application of Al-Skeini) v. Secretary of State for Defence, application for judicial review* (2005) EWCA Civ 1609 (2006) HRLR 7, at para. 101 (citing general comment No. 31 of the Human Rights Committee to establish the extraterritorial application of the Human Rights Act 1998); South Africa, on the one hand, High Court Witwatersrand, *Residents of Bon Vista Mansions v. Southern Metropolitan Local Council*, 2002 (6) BCLR, p. 625, at p. 629 ("general comments have an authoritative status under international law"), as quoted at para. 11 the *Report of the Seventy-first Conference* of the International Law Association (footnote 150 above) and, on the other hand, Constitutional Court, *Minister of Health and Others v. Treatment Action Campaign and Others (No 2)* (CCT 8/02) [2002] ZACC 15, paras. 26 and 37 (rejecting [application of] the "minimum-core standard" set out by the Committee on Economic, Social and Cultural Rights in general comment No. 3 (*Official Records of the Economic and Social Council, 1991, Supplement No. 3* (E/1991/23-E/C.12/1990/8 and Corr.1), annex III, p. 83); Japan, Tokyo District Court, Judgment of 15 March 2001, 1784 *Hanrei Jiho* 67, at 74 ("the General Comment neither represents authoritative interpretation of the ICCPR nor binds the interpretation of the treaty in Japan"), as quoted at para. 87 of the *Report of the Seventy-first Conference* of the International Law Association (footnote 150 above).

[651] See para. (15) of the commentary to draft conclusion 2; see also draft conclusion 12, para. 3.

paragraph 1 (d), of the Statute of the International Court of Justice, thereby characterizing the legal significance of their pronouncements as "subsidiary means for the determination of the rules of law".[652]

(25) The expression "under their mandates" reaffirms paragraph 2 of draft conclusion 13, which specifies that the relevance of a pronouncement of an expert treaty body for the interpretation of a treaty is subject to the applicable treaty rules under which such bodies operate. Paragraph 4 applies in principle to all treaty expert bodies. However, the extent to which pronouncements of expert treaty bodies contribute to the interpretation of the treaties "under their mandates" will vary, as indicated by the use of the plural.

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[652] C. Chinkin, "Sources", in *International Human Rights Law*, 3rd ed., D. Moeckli, S. Shah, S. Sivakumaran and D. J. Harris (eds.) (Oxford, Oxford University Press, 2018), pp. 63–85, at pp. 78–80, as teachings and also possibly judicial decisions; in that direction also: R. Van Alebeek and A. Nollkaemper, "The legal status of decisions by human rights treaty bodies in national law", H. Keller and G. Ulfstein (eds.), *UN Human Rights Treaty Bodies*, Cambridge, Cambridge University Press, 2012, pp. 408 and 410 ff.